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2 **UNITED STATES DISTRICT COURT**3 **DISTRICT OF NEVADA**

4 GEORGE CHESTER ARTHUR,

Case No.: 2:14-cv-02083-RFB-DJA

5 Petitioner

**ORDER**

6 v.

7 WARDEN NEVEN, et al.,

8 Respondents.

9  
10 This case is a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, by George  
11 Chester Arthur. This case is before the Court for adjudication of the merits of Arthur's petition.  
12 For the reasons discussed below, the Court grants the petition.13 **I. BACKGROUND**14 Arthur's convictions are the result of events that occurred in Clark County, Nevada  
15 between February 9, 2007, and February 11, 2007. Chrissandra Barnes testified that she, her  
16 mother, and her sister, Monica Taitano, came home from an evening out and found her stepfather,  
17 Samuel Andrade, deceased on the floor and his vehicle missing. Andrade had been stabbed in the  
18 head eleven times, had his throat slit, and had also been stabbed in the chest and back. It was  
19 immediately suspected that Arthur, Taitano's estranged, long-term boyfriend, had killed Andrade.20 A few days later, law enforcement attempted to perform a traffic stop on Arthur, but after  
21 initially stopping in the parking lot of a Wal-Mart store, Arthur drove away from law enforcement,  
22 accelerating to speeds of 90 to 100 miles per hour. At least ten other law enforcement vehicles and  
23 a helicopter pursued Arthur for 38 miles. Arthur's vehicle was eventually stopped by a spike strip.

1 Arthur then exited his vehicle and was pursued on foot before being tackled and taken into custody.  
2 At that time, Arthur had some bruising, swelling, and scratch marks on his face and some injuries  
3 to his right forearm and hands.

4 Arthur made a telephone call to Taitano while he was in custody and denied involvement  
5 in Andrade's murder. Arthur also told a friend the morning after the killing that he received some  
6 injuries the previous night from being "jumped by two black guys" at a casino. However, a forensic  
7 lab later determined that Arthur's blood and DNA were found in the Andrade home. At his trial,  
8 Arthur admitted that he killed Andrade, but he alleged that he acted in self-defense.

9 Even though he was not welcome at the Andrade home, Arthur testified that he went there  
10 on the evening of February 9, 2007, because he wanted to see Taitano, who was living at the  
11 Andrade home. Arthur knew that Taitano had gone out that evening with her mother and sister,  
12 but he figured that they would have been back home by then. Andrade answered the door, and,  
13 after telling Arthur that they had not yet returned, invited Arthur inside to talk. Andrade directed  
14 Arthur to the master bedroom where Arthur believed Andrade would offer him an alcoholic  
15 beverage or to "smoke a joint." When they got into the bedroom, Andrade was holding a large  
16 knife, told Arthur that he could kill him, and then tried to stab Arthur in the stomach. Andrade cut  
17 Arthur "underneath the elbow," and at that point, Arthur testified that he was "scared and terrified  
18 . . . of getting killed." Arthur then "had to charge him to try to save [his] life." Arthur and Andrade  
19 "struggle[d] for the knife" and "roll[ed] around . . . on the bed."

20 Arthur did not remember stabbing Andrade or cutting his throat. Rather, the next thing  
21 Arthur remembered was being in the hallway bathroom and realizing that "there's blood  
22 everywhere." Arthur "came to" while he was driving Andrade's vehicle. He did not remember  
23 trying to clean up the crime scene, using a bath towel to soak up Andrade's blood, using a towel

1 to wash himself off, or where he disposed of his clothes. Andrade pulled the vehicle over, got  
2 directions back to the Andrade home, walked back to their residence, got in his own vehicle, and  
3 left.

4 On May 7, 2008, following a jury trial, Arthur was found guilty of burglary and first-degree  
5 murder with the use of a deadly weapon. Arthur also pleaded guilty to failing to stop on the signal  
6 of a police officer. Arthur was sentenced to 48 to 120 months for the burglary conviction; 20 years  
7 to life for the first-degree murder conviction plus an additional and consecutive term of 20 years  
8 to life for the deadly weapon enhancement; and 24 to 60 months for the failure to stop conviction.  
9 Arthur appealed, and the Nevada Supreme Court affirmed on October 4, 2010. Remittitur issued  
10 on November 1, 2010.

11 Arthur filed a state habeas petition on October 6, 2011. The state district court granted  
12 Arthur's petition on April 1, 2013. The State appealed, and the Nevada Supreme Court reversed  
13 on November 3, 2014. Arthur then filed his federal habeas petition on December 9, 2014.

14 Following the Nevada Supreme Court's reversal, the state district court issued a new order  
15 denying Arthur's state habeas petition on February 9, 2015. Arthur moved for a stay and abeyance  
16 of his federal proceedings pending final resolution of his claims in state court, which the Court  
17 granted on September 27, 2016. Arthur appealed the state district court's denial, and the Nevada  
18 Supreme Court affirmed on October 13, 2016. Remittitur issued on November 7, 2016.

19 Arthur moved to lift the stay on his federal proceedings and filed his first amended petition  
20 on January 31, 2017. The Court lifted the stay on August 22, 2017. Respondents moved to partially  
21 dismiss Arthur's amended petition on March 2, 2018. The Court granted the motion, in part,  
22 dismissing ground 2.3 of the first amended petition and deferring ruling on the procedural default  
23

1 of ground 10. Respondents answered the remaining claims in Arthur's first amended petition on  
2 February 25, 2019. Arthur replied on August 26, 2019

3 Arthur asserts the following violations of his federal constitutional rights:

- 4 1. The state district court refused to excuse two jurors for cause;
- 5 2. The state district court admitted inadmissible evidence;
- 6 3. The state district court improperly allowed a late-noticed witness to testify
- 7 4. There was prosecutorial misconduct;
- 8 5. His first-degree murder conviction was based on an improper theory of
- 9 6. felony murder;
- 10 7. Several of the jury instructions were confusing, misleading, or a
- 8 misstatement of the law;
- 9 7. There was insufficient evidence supporting his convictions;
- 10 8. There was cumulative error;
- 9 9. There was ineffective assistance of his trial counsel;
- 10 10. The State improperly shifted the burden of proof; and
- 11 11. There was ineffective assistance of his appellate counsel.

11 **II. STANDARD OF REVIEW**

12 28 U.S.C. § 2254(d) sets forth the standard of review generally applicable in habeas  
13 corpus cases under the Antiterrorism and Effective Death Penalty Act ("AEDPA"):

14 An application for a writ of habeas corpus on behalf of a person in custody pursuant  
15 to the judgment of a State court shall not be granted with respect to any claim that  
16 was adjudicated on the merits in State court proceedings unless the adjudication of  
17 the claim –

- 18 (1) resulted in a decision that was contrary to, or involved an unreasonable application  
19 of, clearly established Federal law, as determined by the Supreme Court of the  
United States; or
- 20 (2) resulted in a decision that was based on an unreasonable determination of the facts  
in light of the evidence presented in the State court proceeding.

21 A state court decision is contrary to clearly established Supreme Court precedent, within the  
22 meaning of 28 U.S.C. § 2254, "if the state court applies a rule that contradicts the governing law  
23 set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are  
materially indistinguishable from a decision of [the Supreme] Court." Lockyer v. Andrade, 538

1 U.S. 63, 73 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 405-06 (2000), and citing Bell v.  
 2 Cone, 535 U.S. 685, 694 (2002)). A state court decision is an unreasonable application of clearly  
 3 established Supreme Court precedent within the meaning of 28 U.S.C. § 2254(d) “if the state  
 4 court identifies the correct governing legal principle from [the Supreme] Court’s decisions but  
 5 unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 75 (quoting  
 6 Williams, 529 U.S. at 413). “The ‘unreasonable application’ clause requires the state court  
 7 decision to be more than incorrect or erroneous. The state court’s application of clearly  
 8 established law must be objectively unreasonable.” Id. (quoting Williams, 529 U.S. at 409-10)  
 9 (internal citation omitted).

10 The Supreme Court has instructed that “[a] state court’s determination that a claim lacks  
 11 merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the  
 12 correctness of the state court’s decision.” Harrington v. Richter, 562 U.S. 86, 101 (2011) (citing  
 13 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). The Supreme Court has stated “that even a  
 14 strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id.  
 15 at 102 (citing Lockyer, 538 U.S. at 75); see also Cullen v. Pinholster, 563 U.S. 170, 181 (2011)  
 16 (describing the standard as a “difficult to meet” and “highly deferential standard for evaluating  
 17 state-court rulings, which demands that state-court decisions be given the benefit of the doubt”  
 18 (internal quotation marks and citations omitted)).

19 **III. DISCUSSION**

20 **A. Ground 1**

21 In Ground 1, Arthur argues that his federal constitutional rights were violated when the  
 22 state district court refused to excuse two jurors for cause, namely Cindy Rogers and David  
 23 Gregware. Arthur explains that his trial counsel was forced to use his peremptory challenges to

1 remove Gregware and Rogers, and if he had not been forced to do so, he would have used those  
 2 preemptory challenges on Terrell Otis and Susan Johnson. Id. at 13, 17. Respondents contend that  
 3 the Nevada Supreme Court correctly focused on the panel that deliberated Arthur's guilt, not on  
 4 the alleged failure of the state district court to refuse to strike Rogers and Gregware for cause.

5 In affirming Arthur's conviction on direct appeal, the Nevada Supreme Court held:

6 Arthur argues that the district court erred by failing to excuse two prospective jurors  
 7 for cause. A decision to remove a prospective juror for cause remains within the  
 8 district court's broad discretion. Weber v. State, 121 Nev. 554, 580, 119 P.3d 107,  
 125 (2005).

9 Either party may challenge a juror for cause if it is believed that the juror cannot  
 10 adjudicate the facts fairly, NRS 175.036(1); however, “[t]he test for evaluating  
 11 whether a juror should have been removed for cause is ‘whether a prospective  
 12 juror’s views would prevent or substantially impair the performance of his duties  
 13 as a juror in accordance with his instructions and his oath.’” Weber, 121 Nev. at  
 14 580, 119 P.3d at 125 (quoting Leonard v. State, 117 Nev. 53, 65, 17 P.3d 397, 405  
 15 (2001) (internal quotation omitted)).

16 Here, Arthur contends that he was prejudiced by the district court's error in failing  
 17 to excuse two prospective jurors. Although one of those prospective jurors  
 18 represented that she had past experiences with domestic abuse, and the other  
 19 prospective juror expressed anxiety that he could not manage his business while  
 20 sitting on the jury, both prospective jurors unconditionally represented that they  
 21 would be fair and impartial in performing their duties. The district court refused  
 22 Arthur's request to excuse these prospective jurors for cause, which Arthur claims  
 23 resulted in prejudice because he then had to exhaust his preemptory challenges and  
 was precluded from later removing two other ultimately impaneled jurors.

24 Claims of prejudice “based on [ ] ‘wasted’ preemptory challenge[s] . . . must focus  
 25 on whether the impaneled jury was impartial.” Wesley v. State, 112 Nev. 503, 511,  
 26 916 P.2d 793, 799 (1996). On appeal, Arthur requests that we retreat from this  
 27 standard, but we decline to do so.

28 Arthur argues that had he not exhausted his peremptory challenges on the two  
 29 prospective jurors described above, he would have challenged two other specific  
 30 jurors. Our review of the record indicates that, although one of those other jurors  
 31 was impaneled initially, she was subsequently removed for health reasons and did  
 32 not participate in the jury's deliberations. As such, Arthur has failed to demonstrate  
 33 partiality attributable to this juror. During voir dire, the other juror Arthur indicates  
 34 he would have challenged if he had not exhausted his preemptory challenges  
 35 represented that his father had been a victim of a murder but unhesitantly expressed

1 that, despite the potential similarities of the current case with his father's murder,  
2 he would be fair and impartial. Because Arthur has failed to establish how this  
3 juror's participation on the jury panel created a partial jury, we conclude that the  
4 district court did not abuse its discretion by refusing to remove the previously  
5 described prospective jurors for cause and that Arthur was not prejudiced by  
6 exhausting his preemptory challenges on those jurors.

5 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
6 unreasonable application of clearly established law as determined by the United States Supreme  
7 Court.

8 Arthur challenged prospective jurors Gregware and Rogers for cause. Gregware was a  
9 “[s]mall business owner” and the “[o]nly person working for [his] business.” Gregware had  
10 “anxiety about being [at Arthur's trial] because of [his] business,” as he was “losing money, and  
11 also potential income in the future.” Although Gregware indicated that he “could be a fair juror,”  
12 Gregware answered in the affirmative when asked if his anxiety “might cause [him] to miss things  
13 like testimony” and in the negative when asked if he would “want 12 individuals such as [him]self  
14 to be on” his hypothetical jury. However, when the State indicated that the trial was only supposed  
15 to last a week or so, Gregware stated that, given that information, he “could give everybody a fair  
16 shot and listen to the testimony.” The state district court denied Arthur's challenge for cause,  
17 explaining that “[t]his man . . . would have said anything he had to say to get off the jury, within  
18 bounds of reasonableness.” Thereafter, Arthur's trial counsel used a peremptory challenge to  
19 remove Gregware.

20 Turning to Rogers, she indicated that she might have a difficult time being unbiased if the  
21 facts of the case involved domestic violence between a man and a woman, as she had personal  
22 experience with domestic violence. After the state district court told Rogers that the “person that's  
23 alleged to have been killed in this case is a man, not a woman,” Rogers stated, “[t]hen I would be

1 a fair, be able to make a fair decision.” Rogers also indicated that she “would definitely give it  
 2 [her] best shot to look at all the facts” and “would be able to be fair.” However, following voir dire  
 3 from Arthur’s trial counsel, Rogers stated that she “definitely ha[s] a bias towards men who can’t  
 4 let things go when it’s over” and questioned “[w]hy someone would go to someone’s house where  
 5 they didn’t live and be there or why they couldn’t accept the end of a relationship and continue to  
 6 harass someone.” In denying Arthur’s challenge for cause, the state district court stated that it did  
 7 not believe that Rogers would “be particularly biased or not a fair juror.” Arthur’s trial counsel  
 8 then exercised a peremptory challenge on Rogers.

9 Arthur’s trial counsel indicated that if Gregware and Rogers had been stricken for cause,  
 10 he would have used his preemptory challenges on Terrell Otis and Susan Johnson instead. Otis’s  
 11 “father was the victim of a homicide.” And Johnson indicated that she was “very emotional and  
 12 sensitive” and would probably have an emotional response to graphic pictures that may cloud her  
 13 judgment. Otis served on the jury, but Johnson was excused prior to the matter being submitted to  
 14 the jury.

15 The United States Supreme Court has held that, while the Constitution guarantees a  
 16 defendant the right to an impartial jury, the fact that a defendant is required to use a peremptory  
 17 challenge to cure a trial court’s error in denying a challenge for cause does not constitute a  
 18 constitutional violation. The Court stated:

19 We have long recognized that peremptory challenges are not of constitutional  
 20 dimension. They are a means to achieve the end of an impartial jury. So long as the  
 21 jury that sits is impartial, the fact that the defendant had to use a peremptory  
 22 challenge to achieve that result does not mean the Sixth Amendment was violated.

23 Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (internal citations omitted) (explaining that “[a]ny claim  
 24 that the jury was not impartial . . . must focus . . . on the jurors who ultimately sat”). Indeed, “if

1 the defendant elects to cure [a trial court's erroneous for-cause ruling] by exercising a peremptory  
 2 challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been  
 3 deprived of any . . . constitutional right." United States v. Martinez-Salazar, 528 U.S. 304, 307  
 4 (2000); see also Rivera v. Illinois, 556 U.S. 148, 157 (2009) ("If a defendant is tried before a  
 5 qualified jury composed of individuals not challengeable for cause, the loss of a peremptory  
 6 challenge due to a state court's good-faith error is not a matter of federal constitutional concern.").

7       The Nevada Supreme Court reasonably concluded that the state district court did not err in  
 8 rejecting Arthur's challenges for cause. No prospective juror Arthur challenged for cause was  
 9 seated on his jury, as Arthur did not lodge a challenge for cause against Otis or Johnson. Further,  
 10 after reasonably noting Johnson's dismissal before the submission of the case to the jury, the  
 11 Nevada Supreme Court reasonably determined that Arthur failed to demonstrate how Otis'  
 12 participation made the jury impartial. In fact, although his father was murdered, Otis clearly  
 13 indicated that "notwithstanding [that] experience [he] could be a fair juror." Because Arthur has  
 14 not shown that a biased or unqualified juror served on his jury, Arthur has not shown that his voir  
 15 dire did not meet constitutional requirements. See Skilling v. United States, 561 U.S. 358, 395  
 16 n.31 (2010). Thus, because the Nevada Supreme Court reasonably denied Arthur's claim, Arthur  
 17 is denied federal habeas relief for Ground 1.

18       **B.     Ground 2**

19       In Ground 2, Arthur argues that his federal constitutional rights were violated when the  
 20 state district court admitted several pieces of inadmissible evidence, namely evidence that Arthur  
 21 had a history of domestic violence, a recording of a jailhouse call, the 911 call, and testimony that  
 22 Arthur had been previously incarcerated. These four pieces of evidence will be discussed  
 23 individually below.

1       “A habeas petitioner bears a heavy burden in showing a due process violation based on an  
 2 evidentiary decision.” Boyde v. Brown, 404 F.3d 1159, 1172 (9th Cir. 2005), as amended on reh’g,  
 3 421 F.3d 1154 (9th Cir. 2005). “[C]laims deal[ing] with admission of evidence” are “issue[s] of  
 4 state law.” Holley v. Yarborough, 568 F.3d 1091, 1101 (9th Cir. 2009); see also Lewis v. Jeffers,  
 5 497 U.S. 764 (1990) (“[F]ederal habeas corpus relief does not lie for errors of state law.”).  
 6 Therefore, the issue before the Court is “whether the state proceedings satisfied due process.”  
 7 Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). In order for the admission of  
 8 evidence to provide a basis for habeas relief, the evidence must have “rendered the trial  
 9 fundamentally unfair in violation of due process.” Johnson v. Sublett, 63 F.3d 926, 930 (9th Cir.  
 10 1995) (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991)). Not only must there be “*no* permissible  
 11 inference the jury may draw from the evidence,” but also the evidence must “be of such quality as  
 12 necessarily prevents a fair trial.” Jammal, 926 F.2d at 920 (emphasis in original) (citation omitted).

13                   **1.       Domestic Violence Evidence**

14       Arthur argues that the admission of domestic violence evidence violated his due process  
 15 rights to a fair trial. Arthur also argues that the state district court failed to give a limiting  
 16 instruction informing the jury of the limited way in which it could use the domestic violence  
 17 evidence. In affirming Arthur’s conviction on direct appeal, the Nevada Supreme Court held:

18       Arthur argues that the district court improperly admitted evidence of prior bad acts  
 19 without first conducting a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692  
 20 P.2d 503 (1985), or providing a limiting jury instruction. The State counters that  
 21 the evidence was admissible because it was offered to rebut a false impression of  
 22 Arthur’s conduct and character created by defense counsel’s cross-examination of  
 23 a witness.

“The trial court’s determination to admit or exclude evidence of prior bad acts is a  
 decision within its discretionary authority and is to be given great deference.”  
Braunstein v. State, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). “It will not be  
 reversed absent manifest error.” Id. In analyzing the propriety of admitting evidence of  
 prior bad acts, the trial courts are instructed to follow the parameters of NRS

1 48.045(2) and weigh the probative value of the evidence against the risk of unfair  
 2 prejudice. Id. at 72-73, 40 P.3d at 416-17. We have previously determined that  
 3 when a defendant creates an impression of his character, the State may offer similar  
 4 evidence as rebuttal so long as the evidence “squarely contradict[s] the . . . false  
 5 impression” cause by the defendant’s evidence. Jezdik v. State, 121 Nev. 129, 140,  
 110 P.3d 1058, 1065 (2005); see also U.S. v. Beltran-Rios, 878 F.2d 1208, 1212  
 (9th Cir. 1989) (“We previously have allowed the Government to introduce  
 otherwise excludable testimony when the defendant ‘opens the door’ by  
 introducing potentially misleading testimony.”).

6 On direct examination of the witness, the State diligently avoided asking questions  
 7 related to Arthur’s prior acts of domestic violence or his character. However, during  
 8 cross-examination of the witness, Arthur’s counsel engaged in a series of questions  
 9 that portrayed Arthur as acting childlike when he was intoxicated. Prior to the  
 10 State’s rebuttal examination of the witness, the parties sought clarification from the  
 11 district court as to the proper scope of the State’s rebuttal examination. In  
 12 compliance with the district court’s guidelines, the State’s rebuttal evidence did not  
 13 highlight specific instances of domestic violence or convictions but was limited and  
 14 tailored to evidence rebutting the impression of Arthur’s conduct and character  
 15 while intoxicated. As such, we conclude that the State’s rebuttal evidence squarely  
 16 contradicted Arthur’s impression of his character and conduct and that the district  
 17 court did not abuse its discretion by allowing the State to pursue this line of  
 18 questioning.

19 The Nevada Supreme Court’s rejection of Arthur’s claim was neither contrary to nor an  
 20 unreasonable application of clearly established law as determined by the United States Supreme  
 21 Court.

22 At the trial, during Arthur’s trial counsel’s cross-examination, Taitano testified that Arthur  
 23 “would have to be sober, just to even come around [Andrade’s] house.” Taitano then explained  
 that she would sometimes have to treat Arthur like a child when he had been drinking. During the  
 State’s redirect examination of Taitano, the following colloquy occurred:

24 Q. [Defense counsel] also asked you some questions about [Andrade] and other  
 25 members of the family not liking to be around the Defendant when he was  
 drunk. Do you remember those questions?  
 A. Yes.  
 Q. Is one of the reasons that you didn’t - - he didn’t like the Defendant around  
 when he was drunk because he would become violent with you?  
 A. Yes.  
 Q. Sometimes when he was drunk would he put his hands on you?

1 A. Yes.

2 Q. Did that create problems in your relationship?

3 A. Yes.

4 Q. And [Andrade] was aware of these problems; was he not?

5 A. Yes.

6 Q. Was that one of the reasons [Andrade] did not want the Defendant around  
7 if he was drinking?

8 A. Yes.

9 Arthur's trial counsel objected to the State's foregoing line of questioning, and a bench  
10 conference was held. That bench conference was later put into the record, whereby the State  
11 explained that it believed that Arthur's trial counsel had "opened the door to domestic violence on  
12 the part of Mr. Arthur towards Monica Taitano." The state district court agreed, ruling that "the  
13 State was going to be allowed to go into prior bad acts of Mr. Arthur towards Ms. Taitano,  
14 specifically domestic violence and whether or not he laid his hands in the past on Ms. Taitano and  
15 . . . that's why he had been removed from the house."

16 Regarding the admission of the domestic violence evidence, the Nevada Supreme Court,  
17 the final arbiter of Nevada law, determined that Nevada caselaw provides that the State may offer  
18 evidence rebutting a defendant's evidence that creates an impression of his character—here using  
19 the domestic violence evidence to rebut Arthur's evidence that he acted childlike when intoxicated.  
20 And Arthur has not demonstrated that the lack of a limiting instruction in this instance is a  
21 constitutional issue. See Tavares v. State, 30 P.3d 1128, 1132 (Nev. 2001) ("[T]he failure to give  
22 a limiting instruction on the use of uncharged bad act evidence is a nonconstitutional error.").

23 Therefore, the issue before the Court is only whether the admission of this evidence was so  
prejudicial that it rendered Arthur's trial so fundamentally unfair as to violate due process. Estelle,  
502 U.S. at 70; Jammal, 926 F.2d at 919-20 ("The issue for us, always, is whether the state

1 proceedings satisfied due process; the presence or absence of a state law violation is largely beside  
 2 the point.”).

3 Arthur urges the Court to review this claim *de novo* because the Nevada Supreme Court  
 4 only addressed whether the domestic violence evidence was admissible and failed to address his  
 5 constitutional arguments. The Nevada Supreme Court did not specifically address Arthur’s  
 6 constitutional arguments, but the Court must nonetheless presume that the Nevada Supreme Court  
 7 adjudicated and rejected that aspect of the claim on the merits. See Johnson v. Williams, 568 U.S.  
 8 289, 301 (2013). Even reviewed *de novo*, however, the claim falls short of warranting habeas relief.

9 Although Taitano’s testimony that Arthur would sometimes become violent and put his  
 10 hands on her when he was intoxicated may have been somewhat prejudicial to Arthur, it cannot be  
 11 determined that it rendered Arthur’s trial fundamentally unfair in violation of due process. Estelle,  
 12 502 U.S. at 70. Indeed, the State did not question Taitano about specific instances where Arthur  
 13 became violent with her, the State moved on from this line of questioning relatively quickly, and  
 14 Taitano diluted her own statement by also testifying that she had to treat Arthur like a child when  
 15 he was intoxicated. Further, “[u]nder AEDPA, even clearly erroneous admissions of evidence that  
 16 render a trial fundamentally unfair may not permit the grant of federal habeas corpus relief if not  
 17 forbidden by ‘clearly established Federal law,’ as laid out by the Supreme Court.” Yarborough,  
 18 568 F.3d at 1101 (citing 28 U.S.C. § 2254(d)); see also Dowling v. United States, 493 U.S. 342,  
 19 352 (1990) (explaining that the Supreme Court has “defined the category of infractions that violate  
 20 ‘fundamental fairness’ very narrowly”). And importantly, the Supreme Court “has not yet made a  
 21 ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process  
 22 violation sufficient to warrant issuance of the writ.” Id. Accordingly, Arthur is denied federal  
 23 habeas relief for Ground 2.1.

## 2. Jailhouse Call

2 Arthur argues that the jailhouse telephone call between himself and Taitano was disclosed  
3 very late thereby preventing him from changing his defense, had little purpose other than to inflame  
4 the jury, allowed one witness to comment on his veracity, and contained other information that the  
5 jury should never have learned about, such as his custodial status. In affirming Arthur's conviction  
6 on direct appeal, the Nevada Supreme Court held:

Arthur asserts that the district court committed error when it admitted a recorded jailhouse phone conversation between Arthur and a woman who eventually became a witness at trial because (1) the State did not produce this recording for discovery until the first day of trial, (2) comments made during the phone conversation were irrelevant or improper, (3) the phone conversation revealed Arthur's custodial status, and (4) the conversation was improperly recorded. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Ramat v. State, 125 Nev. \_\_, \_\_, 209 P.3d 268, 269 (2009).

### *Late disclosure of recorded phone conversation*

Arthur argues that the State violated its duty under NRS 174.235(1)(a) to timely disclose, during discovery, the recording of his jailhouse phone conversation wherein Arthur made statements that contradicted his self-defense theory at trial. Similarly, NRS 174.295(1) requires a party who subsequently discovers additional material that is subject to discovery to “promptly notify the other party or the other party’s attorney or the court of the existence of the additional material.” A district court, however, has broad discretion to establish a remedy under NRS 174.295. Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). The court “does not abuse its discretion absent a showing that [a party] acted in bad faith or that the nondisclosure caused substantial prejudice.” Id.

Here, Arthur concedes that the State's late disclosure of the recorded phone conversation was not in bad faith. A review of the record indicates that Arthur never requested a copy of the recorded phone conversation, as required by NRS 174.235(1), and upon discovery of the recorded conversation, the State promptly notified Arthur's counsel and provided counsel with a copy of it. Furthermore, Arthur was a party to the conversation and had knowledge of the statements he made that contradicted his self-defense theory at trial. He cannot now claim to have been prejudiced by its admission. See Rippo v. State, 113 Nev. 1239, 1257, 946 P.2d 1017, 1028 (1997) (concluding that where a defendant had previously spoken with a witness, the defendant had notice of the potentially incriminating evidence and could have reasonably discovered it). Although the State did not disclose the recorded jailhouse phone conversation until the morning of the first day of trial, we

1 conclude that the district court did not abuse its discretion by admitting the  
 2 recording.

3 *Comments in the recorded phone conversation*

4 Next, Arthur argues that the recorded phone conversation is inadmissible because  
 5 it contains inappropriate comments by the other party to the call concerning  
 6 Arthur's credibility and character, consisting of the repeated statement that Arthur  
 7 is a liar. Generally, “[e]vidence of a defendant's character is inadmissible to prove  
 8 that he or she acted in conformity with that character trait on the occasion in  
 9 question unless certain exceptions apply.” Somee v. State, 124 Nev. 434, 446, 187  
 10 P.3d 152, 160 (2008) (citing NRS 48.045).

11 In this case, a careful review of the record surrounding the district court's decision  
 12 to admit the phone conversation reveals that, after listening to the recording of the  
 13 jailhouse phone conversation, the district court expressed concern over the  
 14 comments about Arthur's credibility and character. The court acknowledged that it  
 15 typically does not allow witnesses to accuse defendants of lying; however, the  
 16 district court determined that the phone conversation was relevant and offered  
 17 Arthur the option of giving a limiting instruction to the jury or redacting the specific  
 18 comments where he is called a liar. Arthur refused the limiting instruction because  
 19 he considered it to be ineffective and declined to redact the improper comments  
 20 because it would draw unnecessary attention to them. Because Arthur made a  
 21 decision to not redact the comments concerning his credibility or character, we  
 22 conclude that it was not an abuse of discretion for the district court to admit the  
 23 recorded jailhouse phone conversation under those circumstances.

24 *Arthur's custodial status*

25 Arthur further challenges the recorded jailhouse phone conversation arguing that it  
 26 improperly revealed his custodial status. A defendant is “entitled to not only the  
 27 presumption of innocence, but also to indicia of innocence.” Haywood v. State, 107  
 28 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). This includes the right “to appear  
 29 before the jury without physical restraints.” Id. at 287, 809 P.2d at 1273. Verbal  
 30 references to a defendant's in-custody status “have the same prejudicial effect as  
 31 bringing a shackled defendant into the courtroom.” Id. at 288, 809 P.2d at 1273.

32 In this case, the phone conversation was recorded in the days immediately  
 33 following Arthur's arrest. We conclude that any inference of Arthur's custodial  
 34 status that can be implied from the phone conversation is limited to Arthur's  
 35 custodial status at the time of his arrest and not necessarily his custodial status at  
 36 the time of trial. Simply because a juror learns that a defendant was in custody at  
 37 the time of his arrest, it cannot be reasonably presumed that the juror will believe  
 38 that the defendant is still in custody at the time of trial. Additionally, on direct  
 39 examination, Arthur independently testified that he was in jail at the time the phone  
 40 conversation was recorded; and defense counsel, while cross-examining another

1 witness, referenced that Arthur had been in custody for the last year and nine  
2 months. Therefore, we conclude that the recorded jailhouse phone conversation was  
3 not prejudicial as it did not reveal Arthur's custodial status at the time of trial, and  
any prejudice that can be attributed to Arthur's custodial status is a direct result of  
testimony elicited from Arthur and comments made by Arthur's counsel.

4 *Phone conversation was properly recorded*

5 In his final challenge to the recorded phone conversation, Arthur asserts that it was  
improperly recorded. NRS 209.419 expressly grants detention centers the authority  
6 to record phone conversations so long as signs are posted near the telephone giving  
notice that the conversation may be intercepted. Our review of the record indicates  
7 that signs were posted near the telephone at the time of Arthur's phone  
conversation, and a recording was played at the initiation of the conversation  
8 notifying the parties that the conversation would be recorded. Therefore, we  
conclude that Arthur's argument is without merit.

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10 Following the selection of the jury, Arthur's trial counsel informed the state district court  
11 that he got an email from the State "telling [him] there was an audio tape of a phone call of [Arthur]  
12 and his de facto wife, Monica" and that "[t]he basis of the conversation . . . is essentially that she  
13 asked him what had happened." In the recording, Arthur stated that he did not know, and Taitano  
14 "call[ed] him a liar, time after time after time." Arthur's trial counsel requested that the state district  
15 court exclude the recording in its entirety due to the late disclosure or redact the portions of the  
16 recording where Taitano called Arthur a liar.

17 After listening to the telephone conversation, the state district court allowed the recording  
18 to be admitted into evidence, but it indicated that it "would entertain the possibility of a limiting  
19 instruction to the jury indicating that the response by the young lady is not for the truth of the  
20 matter asserted." Arthur's trial counsel elected not to redact portions of the recording. The state  
21 district court explained that it allowed the telephone call recording because "[i]t certainly militates  
22 against the defendant's theory of the case," as Arthur's defense at trial was that he acted in self-  
23 defense whereas he denied involvement during his telephone call with Taitano.

1 The admission of the jailhouse telephone call between Taitano and Arthur had a substantial  
2 and injurious effect on the jury's verdict. Indeed, the State's late disclosure severely prejudiced  
3 Arthur. Because Arthur denied knowing what happened to Andrade in the jailhouse telephone call,  
4 the jailhouse telephone call played a substantial role in refuting Arthur's self-defense theory,  
5 especially when considered in combination with the late disclosure of Lori Rios' testimony, which  
6 also undermined his self-defense theory, as is discussed in Ground 3.<sup>1</sup> Arthur's trial counsel only  
7 learned about the existence and content of the jailhouse telephone call on April 29, 2008, the day  
8 before giving their opening statement on April 30, 2008. Had Arthur and his counsel known about  
9 this damaging jailhouse telephone call and Rios' testimony discussed in Ground 3 before the trial  
10 began—rather than learning about them, respectively, during voir dire and after giving opening  
11 statements—it is almost certain that Arthur would have abandoned his self-defense theory in lieu  
12 of a defense not directly contradicted by the state's late-disclosed evidence. Instead, as is discussed  
13 further in Ground 3, Arthur was blindsided by the State's improper late disclosure of these pieces  
14 of evidence without adequate time to switch to a more fruitful defense. As the record indicates, the  
15 preparation of a case and theory of defense for a case involving a murder clearly takes months, so  
16 allowing the disclosure and admission of unknown substantially damaging evidence during trial,  
17 as here, renders a defendant's preparation meaningless and results in a fundamentally unfair trial  
18 in violation of due process. Indeed, this is the very reason that prosecutors have constitutional and  
19 ethical obligations to immediately disclose evidence material to innocence or guilt to a defendant

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21 <sup>1</sup> The Court also rejects that Nevada Supreme Court's argument that there was no harm since  
22 Arthur was a participant of the call and should have known of its contents. Due process and  
23 fairness, especially in the context of the disclosure obligations of the government, have never  
turned on a defendant's memory of events. Evidence can be deployed in many ways and for a  
variety of reasons, so disclosure is essential for a defendant to have a fair understanding of the  
evidence to be used against them.

1 in criminal case. Consequently, the Nevada Supreme Court's denial of this claim amounts to an  
 2 objectively unreasonable application of federal law. Accordingly, under a *de novo* review,<sup>2</sup> this  
 3 Court concludes that the state district court's failure to exclude the jailhouse telephone call  
 4 rendered Arthur's trial fundamentally unfair in violation of due process. Arthur is granted federal  
 5 habeas relief for Ground 2.2.<sup>3</sup>

6 **4. Previous Incarceration**

7 Arthur argues that Andrade's wife's testimony improperly divulged to the jury that he was  
 8 previously incarcerated. In affirming Arthur's conviction on direct appeal, the Nevada Supreme  
 9 Court held:

10 Arthur contends that the district court improperly denied a motion for a mistrial  
 11 after a witness testified that Arthur had been previously incarcerated. A district  
 12 court's decision to deny a motion for mistrial is reviewed for an abuse of discretion.  
Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). "A witness's  
 13 spontaneous or inadvertent reference to inadmissible material, not solicited by the  
 14 prosecution, can be cured by an immediate admonishment directing the jury to  
 15 disregard the statement." Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599  
 (2005).

16 In this case, the State was questioning the witness about certain family members'  
 17 living arrangements when the witness made the statement about Arthur's prior  
 18 incarceration. Arthur immediately approached the bench and requested a mistrial,  
 19 which the district court addressed outside the presence of the jury. The district court  
 20 denied Arthur's motion but offered to provide a curative instruction, which Arthur  
 21 declined because he believed it would draw more attention to the statement. When  
 22 the jury returned to the courtroom, the district court did not issue an admonishment  
 23 and the State immediately moved on to a different line of questioning. Although  
 24 the district court did not admonish the jury, the witness's statement was isolated  
 25 and unsolicited by the State. Therefore, we conclude that the district court did not  
 abuse its discretion by denying Arthur's motion for mistrial or by not admonishing  
 the jury.

22<sup>2</sup> See Panetti v. Quarterman, 551 U.S. 930, 948 (2007) ("As a result of [the state court's] error,  
 23 our review of petitioner's underlying . . . claim is unencumbered by the deference AEDPA  
 normally requires").

<sup>3</sup> Ground 2.3 was previously dismissed. ECF No. 55.

1 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
2 unreasonable application of clearly established law as determined by the United States Supreme  
3 Court.

4 Carol Andrade, Andrade's wife, testified that her daughter, Taitano, and her children came  
5 to live with her and Andrade while Taitano and Arthur were having relationship issues. When the  
6 State asked Carol if Arthur was still living in Colorado when she picked up her grandson, Carol  
7 responded, “[h]e was there, but he was in jail.” Id. at 10. Arthur's trial counsel requested a bench  
8 conference and asked the state district court to declare a mistrial based on the statement about his  
9 previous incarceration. The state district court denied the request, stating that it believed that the  
10 statement “was an unfortunate accident” and that it was not “particularly damaging.” Id. at 46. The  
11 state district court offered to give a curative instruction, but Arthur's trial counsel denied the offer.

12 Id.

13 Although Carol's statement that Arthur was previously incarcerated had no permissible  
14 inference, it cannot be concluded that this statement rendered Arthur's trial fundamentally unfair  
15 in violation of his due process rights. Estelle, 502 U.S. at 67; Sublett, 63 F.3d at 930; Jammal, 926  
16 F.2d at 920. As the Nevada Supreme Court reasonably noted, Carol's statement was isolated, and  
17 as such, cannot be considered especially inflammatory. See Hovey v. Ayers, 458 F.3d 892, 923  
18 (9th Cir. 2006) (explaining that “even if there are no permissible inferences the jury can draw from  
19 the evidence in question, due process is violated only if the evidence is ‘of such quality as  
20 necessarily prevents a fair trial’ and reasoning that “[w]e have held that admission of far more

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1 inflammatory evidence did not violate due process"). Because the Nevada Supreme Court  
 2 reasonably denied Arthur's claim, Arthur is denied federal habeas relief for Ground 2.4.<sup>4</sup>

3 **C. Ground 3**

4 In Ground 3, Arthur argues that his federal constitutional rights were violated by the  
 5 admission of witness Lori Rios' testimony. In affirming Arthur's conviction on direct appeal, the  
 6 Nevada Supreme Court held:

7 Arthur contends that the district court improperly permitted a witness to testify  
 8 although she was not properly noticed on the State's witness list. NRS 174.234  
 9 requires that the State must provide the name and last known address of each  
 10 witness that it intends to call at trial. The State acknowledges that NRS 174.234  
 11 also imposes a continuing duty to supplement its witness list. "[F]ailure to endorse  
 12 a witness constitutes reversible error only where the defendant has been prejudiced  
 13 by the omission." Jones v. State, 113 Nev. 454, 473, 937 P.2d 55, 67 (1997). In  
Dossey v. State, we determined that an endorsement disclosing the witness's place  
 14 of employment but not the witness's name was sufficient because the defense could  
 15 have discovered the witness's identity with "minimal and reasonable efforts." 114  
 16 Nev. 904, 907, 964 P.2d 782, 784 (1998). And, even if a witness is erroneously  
 17 endorsed, "the proper remedy is a continuance, not exclusion of the witness's  
 18 testimony." Id. at 908, 964 P.2d at 784.

19 Here, the State noticed the witness on its witness list but listed the witness's address  
 20 as unknown. The State represented that it never knew the witness's address and  
 21 therefore could not supplement its witness list. Arthur likewise included the witness  
 22 on his witness list that he provided to the State. Despite including the witness on  
 23 his own witness list, Arthur argues that, without the witness's contact information,  
 he did not have an opportunity to interview the witness prior to trial and discover  
 the content of her testimony. The district court permitted the witness to testify,  
 finding that the State did not act in bad faith when it failed to ascertain contact  
 information for the witness and then supplement its witness list.

24 At trial, the witness, a relative and neighbor of the victim, testified that one month  
 25 prior to the murder, Arthur commented to her that he was sent to kill the victim.  
 Notwithstanding the witness's condemning testimony, Arthur was able to conduct  
 a thorough cross-examination of the witness. Furthermore, once the district court  
 permitted the State to call the witness to testify at trial, Arthur did not request a

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22<sup>4</sup> Arthur argues that he is entitled to relief based on the cumulative impact of the evidence  
 23 addressed in Ground 2. ECF No. 66 at 37-38. The Court agrees that cumulative error warrants  
 relief in this case, but disagrees that this cumulative error arises solely from the asserted errors  
 under Ground 2.

1 continuance in order to interview the witness and discover the content of her  
 2 testimony.

3 We conclude that, with reasonable efforts, Arthur could have discovered the  
 4 witness's contact information. And, because Arthur included the witness on his  
 5 witness list, Arthur cannot now complain that he did not have proper notice or  
 6 knowledge of the witness's testimony prior to trial. Additionally, Arthur was able  
 7 to adequately challenge the witness's testimony on cross-examination. Under these  
 8 circumstances, we conclude that Arthur was not prejudiced by the State's failure to  
 9 provide the witness's contact information and reversal is not warranted.

10 Arthur argues that he never included Rios on his witness list, so the Nevada Supreme  
 11 Court's decision was based on an unreasonable determination of the facts. This Court agrees.  
 12 Although this "fact" was likely based on Arthur's trial counsel's misstatement at trial that he  
 13 "actually put [Rios] on our witness list," Rios did not appear on Arthur's witness list. Therefore,  
 14 because the Nevada Supreme Court's decision was based on an unreasonable determination of the  
 15 facts, this ground will be reviewed *de novo*.<sup>5</sup> See *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)  
 16 ("As a result of [the state court's] error, our review of petitioner's underlying . . . claim is  
 17 unencumbered by the deference AEDPA normally requires"); *Hurles v. Ryan*, 752 F.3d 768, 778  
 18 (9th Cir. 2014) ("If we determine, considering only the evidence before the state court, that . . . the  
 19 state court's decision was based on an unreasonable determination of the facts, we evaluate the  
 20 claim *de novo*.").  
 21

22 Lori Rios was listed on the State's Notice of Witnesses. Her address was listed as unknown.  
 23 On April 30, 2008, the first day of presentation of evidence at the trial, during a bench conference,  
 24 the State mentioned "a previous threat" that Arthur had made against Andrade. The next day, May  
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1, 2008, the State called Rios during its case-in-chief. After the State asked Rios some preliminary questions, Arthur's trial counsel requested a bench conference because "it became apparent she was going to testify to" the threat that was mentioned the previous day. During the bench conference, Arthur's trial counsel explained the following: (1) Rios' statements were not included anywhere in the discovery materials, and (2) he had not spoken to Rios before trial because he did not know her address or telephone number and "was unaware of the contents of her specific testimony." In response, the prosecutors explained that they did not have a telephone number or address for Rios, and, although they had listed Rios as a possible witness a month before trial, they had only learned the contents of Rios' testimony the week before trial. Arthur's trial counsel requested that the state district court exclude Rios' testimony. The state district court denied the request, explaining that (1) it did not "see any glaring oversight on the part of either side" regarding noticing and investigating Rios and (2) Arthur is only entitled to a fair trial, not a perfect one.

Rios, who was Andrade's niece, testified that Arthur came over to her home on December 30, 2006, a little more than a month before Andrade was killed. During that visit, Arthur "stated [to Rios] that God had sent him here to kill" Andrade because Andrade "always talked smack about everybody." Rios took this threat seriously and told other family members. Rios later saw Arthur in the vicinity of the Andrade residence on the night that Andrade was killed.

This Court finds that the state district court's failure to exclude Rios' testimony rendered Arthur's trial fundamentally unfair in violation of due process. *Estelle*, 502 U.S. at 70. On April 30, 2008, during opening statements, Arthur's trial counsel announced Arthur's defense: he killed Andrade in self-defense. Later that day, during a bench conference, Arthur's trial counsel learned for the first time from the State that it had a witness who would testify that Arthur had previously

1 threatened Andrade's life.<sup>6</sup> Most damning and troubling is that the State was aware of Rios'  
2 proffered testimony several days before trial and only disclosed it after defense counsel's opening  
3 statement. This evidence, which was presented the next day during Rios' testimony, completely  
4 and directly rebutted Arthur's theory of defense that had just been presented to the jury. The  
5 harmful effect of this improper late disclosure was, as noted, compounded by the other similarly  
6 improper late disclosure of the jailhouse call and its contents to the defense. Specifically, Arthur's  
7 theory that he went to the Andrade home looking for Taitano and was attacked unexpectantly by  
8 Andrade was repudiated by the jailhouse call and Rios' testimony that Arthur has previously  
9 expressed his desire to kill Andrade. Because Arthur was already committed to his theory of self-  
10 defense at the time the defense learned of this significantly damaging evidence, it was too late for  
11 Arthur and his counsel to shift to a different defense theory, alter their trial strategy to better combat  
12 this evidence, or further pursue pre-trial negotiations. Indeed, in light of the other evidence casting  
13 doubt on Arthur's self-defense theory, namely the actions he took after the murder, it appears  
14 significantly likely that knowing Rios' testimony prior to trial would have swayed Arthur and his  
15 defense team to entirely abandon the self-defense theory. As the defense's knowledge of Rios'  
16 testimony was gained after the defense had already locked itself into a defense—now a failing

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18 <sup>6</sup> As the State knew about Rios' testimony before the trial started, it clearly violated its legal and  
19 ethical obligations by withholding the contents of Rios' testimony from the defense. This  
20 deception was made even more egregious and compounded by the fact that the State chose not to  
21 amend its notice of witnesses prior to trial to include Rios' contact information, which it  
22 presumably obtained during its interview of her. This inaction effectively hindered any chance that  
23 the defense would learn about Rios' testimony on its own before the trial started. Contrarily, as is  
further explained in Ground 9.3(b), this Court also does not intend to imply that Arthur's trial  
counsel acted deficiently because (1) there was no apparent need to investigate Rios given that she  
had never made a witness statement to police and given that Arthur denied making any statement  
to Rios, and (2) trial counsel has no obligation to investigate every witness on a witness list. See  
Strickland, 466 U.S. at 691 (1984) ("In any ineffectiveness case, a particular decision not to  
investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy  
measure of deference to counsel's judgments").

1 defense—the state district court’s failure to exclude Rios’ testimony rendered Arthur’s trial  
 2 fundamentally unfair in violation of due process.

3 This Court also finds, as noted, that the admission of Rios’ testimony “had substantial and  
 4 injurious effect or influence in determining the jury’s verdict.” Brecht v. Abrahamson, 507 U.S.  
 5 619, 637-38 (1993)). Arthur did not dispute at trial that he killed Andrade. Rather, the dispute at  
 6 trial centered on whether Arthur acted in self-defense in killing Andrade. Rios’ testimony that  
 7 Arthur told her that God had sent him to kill Andrade about a month before Arthur killed Andrade  
 8 goes to the heart of the State’s argument that Arthur did not act in self-defense. Indeed, the only  
 9 evidence regarding Arthur’s state of mind came from Rios’ and Arthur’s conflicting testimonies.  
 10 Consequently, Rios’ testimony was substantial and materially injurious, so the trial court’s failure  
 11 to exclude Rios’ testimony was not harmless.

12 Arthur is granted federal habeas relief for Ground 3.

13 **D. Ground 4**

14 In Ground 4, Arthur argues that his federal constitutional rights were violated when the  
 15 State committed multiple acts of misconduct during its closing argument. Specifically, Arthur  
 16 alleges that the State improperly disparaged him and his defense and then improperly pleaded with  
 17 the jury to “strike a blow for justice.”

18 “[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is  
 19 the fairness of the trial, not the culpability of the prosecutor.” Smith v. Phillips, 455 U.S. 209, 219  
 20 (1982). “The relevant question is whether the prosecutors’ comments ‘so infected the trial with  
 21 unfairness as to make the resulting conviction a denial of due process.’” Darden v. Wainwright,  
 22 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); see also  
 23 Brown v. Borg, 951 F.2d 1011, 1017 (9th Cir. 1991) (“Improprieties in closing arguments can,

1 themselves, violate due process.”). A court must judge the remarks “in the context in which they  
 2 are made.” Boyde v. California, 494 U.S. 370, 385 (1990). The fairness of a trial is measured “by  
 3 considering, inter alia, (1) whether the prosecutor’s comments manipulated or misstated the  
 4 evidence; (2) whether the trial court gave a curative instruction; and (3) the weight of the evidence  
 5 against the accused.” Tan v. Runnels, 413 F.3d 1101, 1115 (9th Cir. 2005). “[P]rosecutorial  
 6 misconduct[ ] warrant[s] relief only if [it] ‘had substantial and injurious effect or influence in  
 7 determining the jury’s verdict.’” Wood v. Ryan, 693 F.3d 1104, 1113 (9th Cir. 2012) (quoting  
 8 Brecht, 507 U.S. at 637-38).

## 9                   1.     **Disparagement**

10                   Arthur contends that the State’s comments suggesting that the defense team made up his  
 11 claim of self-defense was improper. In affirming Arthur’s conviction on direct appeal, the Nevada  
 12 Supreme Court held:

13                   Arthur argues that the State inappropriately undermined and disparaged his self-  
 14 defense theory by suggesting that the defense concocted this theory to fit the  
 15 evidence. In particular, Arthur contends that he was disparaged by the prosecutor’s  
 16 comments during closing argument that self-defense “has not always been  
 17 [Arthur’s] defense” and “[Arthur] says self-defense now because he can no longer  
 18 say he wasn’t there.” Defense counsel objected to the latter comment.

19                   On review of the record illustrates that the prosecutor focused his attention on the  
 20 testimonial evidence adduced at trial and properly depicted the deficiencies in  
 21 Arthur’s defense. The prosecutor later acknowledged the elementary standards for  
 22 self-defense and demonstrated that the evidence presented did not support the  
 23 defense. We conclude that the prosecutor’s comments did not unfairly result in a  
 denial of due process nor were they prejudicial to Arthur.

20                   The State made the following comment during closing argument:

21                   Of course, the Defense stands up in front of you and asks you to find the defendant  
 22 not guilty. This is the self-defense defense. But there’s something very important  
 23 that I tried to illustrate at the end of my cross-examination of the defendant, and  
 that’s this. That while that is his defense today, it has not always been his defense.

1 Following Arthur's trial counsel's objection to the foregoing comment and the state district court's  
 2 overruling of the objection, the State continued:

3 He makes a phone call to Monica, the one person, by the way, he probably would  
 4 say he cares about the most, the one person that you would expect he would be  
 honest with.

5 And what does he do to her? In his own words, he lied. And what does he say?  
 6 They got me on that old bench warrant. He doesn't mention anything about the fact  
 that he ran from the cops related to the murder of Samuel Andrade.

7 She asks him: Hey, why did you run? I wasn't running. That's what he says back  
 8 then. I was leaving, leaving town. For what? How come they caught you out in  
 Moapa? I was going to get fireworks. That's his story then.

9 What else does he say? I wasn't there. I have an alibi. Hey, I told them what  
 10 happened, I was out on Alexander Street. My alibi is myself. That's his story. That's  
 the defense the defendant puts forth back in February of 2007.

11 So why is it important? Because, ladies and gentlemen, that's the defense he puts  
 12 forward. And I would submit to you based on your observations, you probably  
 know that the defendant isn't the brightest guy in the world.

13 He probably doesn't have a lot of education, and he probably didn't think through  
 14 exactly what he was doing when [he] cleaned up the crime scene. He may not have  
 realized that the blood that he left behind could be traced back to him. But that's  
 his defense back then before.

16 Arthur's trial counsel objected again, but the state district court overruled the objection.

17 The State continued:

18 Here's the facts. He makes that statement in his defense to the person he cares about  
 19 most before he knows that the cops are going to find his DNA. And not in one  
 20 place, or two, or three, four, or even five, but he makes those statements back then  
 before his DNA is found in over 20 places in Sam Andrade's car and in Sam  
 Andrade's house.

21 That's what the defendant says then. What does he say now? Well, he took the  
 22 witness stand. He put forth his version of what happened and he says self-defense.  
 Why does he say self-defense now? He says self-defense now because he can no  
 longer say he wasn't there. He says self-defense because he's got to. He's got to  
 because his DNA is painted all over Sam Andrade's house.

1 Several minutes later, the State commented:

2 I would submit to you that a conviction of second degree murder would probably  
3 be better for this defendant than a conviction of first degree murder. And I would  
submit to you that's one reason why they bring it up.

4 But I would submit to you there's another reason as well. The more they can make  
5 him look like a bumbling, happy drunk, the kind of drunk who talks like a little kid  
6 and gets kicked out of the house, the less he looks like the mean, angry drunk who  
has been allowed around the family.

## 7 2. "Strike a Blow" Comment

8 Arthur contends that the State's "strike a blow" comment implored the jury to ignore the  
9 evidence and the beyond a reasonable doubt standard.

10 Before the case was submitted to the jury, the State made one final comment:

11 Ladies and gentlemen, the defendant's sole purpose in those actions was to kill Sam  
12 Andrade. It is now your purpose, as the jury instructions describe, that your sole,  
fixed and steadfast purpose of providing equal and exact justice for both the  
13 defendant and the State of Nevada. It is your opportunity, ladies and gentlemen, to  
strike a blow, not a blow as this defendant did causing death, but it is your  
opportunity to strike a blow for justice and find him guilty.

15 In affirming Arthur's conviction on direct appeal, the Nevada Supreme Court held:

16 The prosecutor concluded his closing argument by imploring the jury to "strike a  
blow for justice." Arthur failed to object to the prosecutor's final comment but now  
17 argues that it was inappropriate. "Generally, the failure to object [at trial] precludes  
appellate review absent plain error." Browning v. State, 124 Nev. 517, 533, 188  
18 P.3d 60, 71 (2008). To constitute plain error, the "'error must be so unmistakable  
that it is apparent from a casual inspection of the record.'" Nelson v. State, 123  
19 Nev. 534, 543, 170 P.3d 517, 524 (2007) (quoting Garner v. State, 116 Nev. 770,  
783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118  
20 Nev. 648, 655, 56 P.3d 868, 872 (2002)).

21 In support of his argument, Arthur relies on U.S. v. Beasley where the prosecutor  
invoked the jury to be part of the "war on drugs." 2 F.3d 1551, 1559-60 (11th Cir.  
1993). The Beasley court determined that the comments were improper and were  
22 an "appeal by the prosecutor for the jury to act as 'the conscience of the  
community,'" and "were 'calculated to inflame.'" Id. at 1560 (quoting United  
States v. Bascaro, 742 F.2d 1335, 1354 (11th Cir. 1984), abrogated on other

grounds by U.S. v. Lewis, 492 F.3d 1219, 1221-22 (11th Cir. 2007)). Notably, however, the court concluded that the comments did not amount to reversible error. Id.

We similarly conclude here that the prosecutor's comment for the jury to "strike a blow for justice" was inappropriate and calculated to inflame the jury. However, when viewed in context of the entire record and the substantial evidence of guilt, the prosecutor's final comment did not affect Arthur's substantial rights, and therefore, did not amount to plain error. See Nelson, 123 Nev. at 543, 170 P.3d at 524.

### 3. Analysis

8 The State is allowed to criticize defense theories and to comment on the facts presented at  
9 the trial during closing argument. See United States v. Sayetsitty, 107 F.3d 1405, 1409 (9th Cir.  
10 1997) (“Criticism of defense theories and tactics is a proper subject of closing argument.”); see  
11 also United States v. Lopez-Alvarez, 970 F.2d 583, 597 (9th Cir. 1992) (“[T]he propriety of the  
12 prosecutor’s remarks must be judged in relation to what would constitute a fair response to the  
13 remarks of defense counsel.”); Drayden v. White, 232 F.3d 704, 713 (9th Cir. 2000) (concluding  
14 that the State’s improper closing argument did not infect the trial with unfairness because “the  
15 prosecutor’s statements were supported by the evidence and reasonable inferences that could be  
16 drawn from the evidence”). The State, however, is prohibited from making comments intended to  
17 inflame the jury. See United States v. Weatherspoon, 410 F.3d 1142, 1149 (9th Cir. 2005) (“We  
18 have consistently cautioned against prosecutorial statements designed to appeal to the passions,  
19 fears and vulnerabilities of the jury”); United States v. Nobari, 574 F.3d 1065, 1077 (9th Cir. 2009)  
20 (finding that “[t]he prosecution’s comment was an improper appeal to jurors’ emotions and fears”).

21 Because the State's "strike a blow" comment was made for the sole purpose of inflaming  
22 the jury, it was improper. Turning to the State's comments disparaging Arthur's defense, on the  
23 surface, these comments appear to be properly denouncing the theory of defense. However, in light

1 of the State's failure to meet its legal and ethical obligations regarding the timely disclosure of the  
2 jailhouse telephone call and Rios' testimony, which directly negated Arthur's theory that he acted  
3 in self-defense, the Court finds that the State improperly trapped Arthur into a losing self-defense  
4 theory—as was discussed, in part, in Grounds 2.2 and more thoroughly in Ground 3—and then  
5 capitalized on its intentional failure to disclose during closing argument by commenting that  
6 Arthur's self-defense theory lacked support. As such, the State's disparagement was also improper.  
7 While these inappropriate comments alone may not provide a basis for finding a due process  
8 violation, when considered in combination with the State's improper conduct regarding the  
9 jailhouse telephone call and Rios, these improper comments rendered Arthur's trial fundamentally  
10 unfair in violation of due process. Consequently, the Nevada Supreme Court's denial of these  
11 claims amounts to an objectively unreasonable application of federal law. And because these  
12 instances of prosecutorial misconduct had a substantial and injurious influence in determining the  
13 jury's verdict, Arthur is granted federal habeas relief for Ground 4.

14       **E.     Ground 5**

15       In Ground 5, Arthur argues that his federal constitutional rights were violated because first-  
16 degree murder cannot be based on an improper theory of felony murder. Arthur explains that the  
17 State tautologically used the homicide as the basis for the burglary and the burglary as the basis  
18 for the homicide. Arthur further explains that if the intended crime was the homicide, as the State  
19 alleged, then the burglary occurred during the commission of the homicide and the felony murder  
20 doctrine does not apply. In affirming Arthur's conviction on direct appeal, the Nevada Supreme  
21 Court held:

22       The State charged Arthur with burglary and murder, among other charges, and  
23 specified in the indictment that the murder charge rested on alternative theories of  
liability, including felony murder—"killing . . . during the perpetration or attempted  
perpetration of burglary." In the burglary charge, the State alleged that Arthur

1 entered the victim's home with the "intent to commit an assault and/or battery  
 2 and/or a felony." Arthur extrapolates that the use of the terms "and/or a felony" is  
 3 a disguise for homicide or murder and that the felony murder doctrine should not  
 4 be applied when, as here, the predicate felony of burglary is based upon entering  
 5 the residence with the intent to commit murder.

6 In State v. Contreras, this court held that Nevada's statutory scheme allows for a  
 7 felony murder charge where the predicate felony is burglary. 118 Nev. 332, 336-  
 8 37, 46 P.3d 661, 664 (2002). In reaching this conclusion, we adopted the rationale  
 9 in People v. Miller, 297 N.E.2d 85 (N.Y. 1973), that any burglary, including one  
 10 based on intent to assault, justifies application of the felony-murder rule, and stated  
 11 that "[w]e do not believe it is appropriate to apply the merger doctrine to felony  
 12 murder when the underlying felony is burglary, regardless of the intent of the  
 13 burglary." 118 Nev. at 336-37, 46 P.3d at 663-64. Arthur argues, however, that in  
 14 People v. Cahill, 809 N.E.2d 561 (N.Y. 2003), the New York Court of Appeals  
 15 "retreated from an overly-expansive interpretation of the felony-murder doctrine"  
 16 in Miller, thus undermining our decision in Contreras.

17 In Cahill, the court determined that the New York statute that "elevates intentional  
 18 murder [committed during a burglary] to capital-eligible murder" requires that the  
 19 defendant's intent underlying the burglary be independent of the intent to murder.  
 20 809 N.E.2d at 587. Otherwise, "the class of those eligible for the death penalty . . .  
 21 would widen." Id. at 589. Understandably, the Cahill court emphasized that because  
 22 Miller interpreted New York's felony-murder status, not its capital-punishment  
 23 statute, "Miller is distinguishable on the facts and in its legal premise." Id. The court  
 24 further stated that "we leave our body of felony murder jurisprudence intact." Id.  
 25 However, even if Cahill modified or overruled Miller, that case is not binding on  
 26 this court and, thus, we conclude that Arthur's argument lacks merit and we need  
 27 not revisit our holding in Contreras.

28 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
 29 unreasonable application of clearly established law as determined by the United States Supreme  
 30 Court.

31 Nev. Rev. Stat. § 200.030(1)(b) provides that "[m]urder of the first degree is murder which  
 32 is . . . [c]ommited in the perpetration or attempted perpetration of . . . burglary." And Nev. Rev.  
 33 Stat. § 205.060 provides that burglary occurs when "a person . . . by day or night, enters any house  
 34 . . . with the intent to commit . . . assault or battery on any person or any felony." The language  
 35 used in Arthur's indictment adheres to these definitions. Indeed, the indictment charged Arthur

1 with murder with the use of a deadly weapon, which the State alleged occurred under the following  
 2 principles of criminal liability: “(1) by having premeditation and deliberation in its commission;  
 3 and/or (2) the killing occurring during the perpetration or attempted perpetration of burglary.” And  
 4 the indictment charged Arthur with burglary, alleging that Arthur “willfully, unlawfully and  
 5 feloniously enter[ed Andrade’s home], with intent to commit an assault and/or battery and/or a  
 6 felony.” Because the States have the power “to define criminal offenses,” Jackson v. Virginia, 443  
 7 U.S. 307, 324 n.16 (1979), and because the indictment in the case accurately reflects Nevada’s law  
 8 defining first degree murder and burglary, Arthur has failed to establish a basis for the Court to  
 9 grant relief. See Bradshaw v. Richey, 546 U.S. 74, 76 (2005); see also Carey v. Musladin, 549  
 10 U.S. 70, 77 (2006). Arthur is denied federal habeas relief for Ground 5.

11 **F. Ground 6**

12 In Ground 6, Arthur argues that his federal constitutional rights were violated because  
 13 several of the jury instructions were confusing, misleading, or a misstatement of the law.  
 14 Specifically, Arthur takes issue with Jury Instruction Nos. 16, 19, 20, 24, 33, and 38. Issues relating  
 15 to jury instructions are not cognizable in federal habeas corpus unless they violate due process.  
 16 Estelle v. McGuire, 502 U.S. 62, 72 (1991); see also Gilmore v. Taylor, 508 U.S. 333, 342 (1993)  
 17 (“[W]e have never said that the possibility of a jury misapplying state law gives rise to federal  
 18 constitutional error.”). The question is ““whether the ailing instruction by itself so infected the  
 19 entire trial that the resulting conviction violates due process’, . . . not merely whether ‘the  
 20 instruction is undesirable, erroneous, or even universally condemned.”” Henderson v. Kibbe, 431  
 21 U.S. 145, 154 (1977) (quoting Cupp v. Naughten, 414 U.S. 141, 146-47 (1973)). When reviewing  
 22 a jury instruction, the Court considers that jury instruction “in the context of the instructions as a  
 23 whole and the trial record.” Estelle, 502 U.S. at 72; see also United States v. Frega, 179 F.3d 793,

1 806 n.16 (9th Cir. 1999) (“In reviewing jury instructions, the relevant inquiry is whether the  
 2 instructions as a whole are misleading or inadequate to guide the jury’s deliberation.”).  
 3 Furthermore, jurors are presumed to follow the instructions that they are given. United States v.  
 4 Olano, 507 U.S. 725, 740 (1993). Even if an instruction contains a constitutional error, the Court  
 5 must then “apply the harmless-error analysis mandated by Brech[ v. Abrahamson, 507 U.S. 619  
 6 (1993)].” Calderon v. Coleman, 525 U.S. 141, 146 (1998). The question is whether the error had  
 7 a “substantial and injurious effect or influence in determining the jury’s verdict.” Id. at 145.

8                   **1.       Jury Instruction No. 16**

9                   Arthur argues that Jury Instruction No. 16 improperly emphasized how quickly  
 10 premeditation can be formed and was at odds with the same instruction’s definition of deliberation.  
 11 In affirming Arthur’s conviction on direct appeal, the Nevada Supreme Court held:

12                   Arthur argues that the district court erred when instructing the jury on premeditation  
 13 because the instruction “improperly emphasized the rapidity with which  
 premeditation can be formed.” . . .

14                   The language in jury instruction no. 16 tracks verbatim the instructions “we set  
 15 forth . . . for use by the district courts in cases where defendants are charged with  
 16 first-degree murder based on willful, deliberate, and premeditated killing.” Byford  
 17 v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000). Arthur acknowledges  
 18 that this instruction comports with Byford but argues that emphasizing the  
 19 instantaneous nature of premeditation undermines the requirement of deliberation.  
 20 We decline to revisit Byford and conclude that Arthur’s argument lacks merit and  
 reversal is not warranted on this issue.

21                   The Nevada Supreme Court’s rejection of Arthur’s claim was neither contrary to nor an  
 22 unreasonable application of clearly established law as determined by the United States Supreme  
 23 Court.

24                   Jury Instruction No. 16 provides:

25                   Murder of the first degree is murder which is perpetrated by means of any kind of  
 willful, deliberate, and premeditated killing. All three elements - - willfulness,

1           deliberation, and premeditation - - must be proven beyond a reasonable doubt  
2           before an accused can be convicted of first-degree murder.

3           Willfulness is the intent to kill. There need be no appreciable space of time between  
4           formation of the intent to kill and the act of killing.

5           Deliberation is the process of determining upon a course of action to kill as a result  
6           of thought, including weighing the reasons for and against the action and  
7           considering the consequences of the actions.

8           A deliberate determination may be arrived at in a short period of time. But in all  
9           cases the determination must not be formed in passion, or if formed in passion, it  
10           must be carried out after there has been time for the passion to subside and  
11           deliberation to occur. A mere unconsidered and rash impulse is not deliberate, even  
12           though it includes the intent to kill.

13           Premeditation is a design, a determination to kill, distinctly formed in the mind by  
14           the time of the killing.

15           Premeditation need not be for a day, an hour, or even a minute. It may be as  
16           instantaneous as successive thoughts of the mind. For if the jury believes from the  
17           evidence that the act constituting the killing has been preceded by and has been the  
18           result of premeditation, no matter how rapidly the act follows the premeditation, it  
19           is premeditated.

20           As the Nevada Supreme Court reasonably acknowledged, Jury Instruction No. 16 mirrors  
21           the instruction formulated by the Nevada Supreme Court “for use by the district courts in cases  
22           where defendants are charged with first-degree murder based on willful, deliberate, and  
23           premeditated killing.” Byford v. State, 994 P.2d 700, 714 (Nev. 2000). Additionally, contrary to  
Arthur’s urgings, Jury Instruction No. 16 does not inappropriately emphasize how quickly  
premeditation can be formed. Arthur contends that Jury Instruction No. 16 provides that “if  
premeditation is instantaneous then no jury will be able to convict a person of second-degree  
murder,” but Arthur misstates Jury Instruction No. 16’s language. Jury Instruction No. 16 does not  
provide that premeditation can be instantaneous, but rather it provides that premeditation “may be  
as instantaneous as successive thoughts of the mind.” And importantly, Jury Instruction No. 16

1 also clearly explains that premeditation must be “formed in the mind by the time of the killing,”  
 2 not contemporaneous with the killing. See id. Accordingly, this claim lacks any legal or factual  
 3 foundation, whether on *de novo*<sup>7</sup> or deferential review. Arthur is denied federal habeas relief for  
 4 Ground 6.1.

5 **2. Jury Instruction No. 19**

6 Arthur argues that Jury Instruction No. 19, the felony murder instruction, was confusing  
 7 and misleading.. In affirming Arthur’s conviction on direct appeal, the Nevada Supreme Court  
 8 held:

9 Jury instruction no. 19 instructed jurors that felony murder presumes premeditation  
 10 and malice aforethought; however, Arthur argues that the instruction may have  
 been confusing and misleading. . . .

11 Despite arguing that the instruction is confusing and misleading, Arthur  
 12 acknowledges that it is a correct statement of the law. Because the instruction is a  
 13 correct statement of the law, we conclude that the jury was properly instructed and  
 14 that Arthur has failed to demonstrate that his substantial rights were affected.

15 The Nevada Supreme Court’s rejection of Arthur’s claim was neither contrary to nor an  
 16 unreasonable application of clearly established law as determined by the United States Supreme  
 Court.

17 Jury Instruction No. 19 provides:

18 There is a kind of murder which carries with it conclusive evidence of  
 19 premeditation and malice aforethought. This class of murder is murder committed  
 20 in the perpetration or attempted perpetration of burglary. Therefore, a killing which  
 21 is committed in the perpetration of such a burglary is deemed to be Murder of the  
 22 First Degree, whether the killing was intentional or unintentional or accidental. This  
 23 is called the Felony-Murder rule.

24 The intent to perpetuate or attempt to perpetuate the burglary must be proven  
 beyond a reasonable doubt.

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25 <sup>7</sup> Arthur urges the Court to review this claim *de novo* because the Nevada Supreme Court  
 never considered the constitutional implications of Jury Instruction No. 16. ECF No. 66 at 55.

1 Arthur contends that “[w]here the intended offense was the homicide, the felony-murder  
 2 rule and, hence, the presumption of premeditation/malice does not apply.” However, Arthur fails  
 3 to explain how Jury Instruction No. 19 conflicts with this idea. Jury Instruction No. 19 clearly  
 4 states that the killing must be “committed in the perpetration or attempted perpetration of burglary”  
 5 in order for the felony murder rule to apply. It does not provide the opposite—that the burglary  
 6 can be committed in the perpetration of the homicide for the rule to apply—as Arthur seems to  
 7 argue. Therefore, because Arthur fails to persuade the Court that Jury Instruction No. 19 is  
 8 confusing or misleading in violation of his due process rights, whether on *de novo*<sup>8</sup> or deferential  
 9 review, Arthur is denied federal habeas relief for Ground 6.2.

10                   **3.       Jury Instruction No. 20**

11 Arthur argues that Jury Instruction No. 20 improperly suggested that the jury must  
 12 unanimously reject first-degree murder before it can consider a lesser offense, thereby minimizing  
 13 the State’s burden of proof. In affirming Arthur’s conviction on direct appeal, the Nevada Supreme  
 14 Court held:

15                   Arthur also asserts that jury instruction no. 20 requires that the jurors unanimously  
 16 reject first-degree murder before considering second-degree murder. . . .

17 Arthur contends that this instruction misstated the jury’s legal obligations and  
 18 minimized the State’s burden of proof because the jury should have returned a  
 19 lesser verdict if any juror had reasonable doubt about whether the crime charged  
 20 was murder in the first degree. Jury instructions that improperly minimize the  
 21 State’s burden of proof can be considered a violation of the defendant’s  
 22 constitutional due process rights. *Francis v. Franklin*, 471 U.S. 307, 313 (1985).  
 23 We conclude that jury instruction no. 20 is not a misstatement of the law. When  
 24 considered in its entirety, the final paragraph of jury instruction no. 20 instructs the  
 25 jurors that if there is reasonable doubt whether the murder was committed in the  
 26 first or second degree, then the jury must return a verdict of second-degree murder.

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27                   <sup>8</sup> Arthur urges the Court to review this claim *de novo* because the Nevada Supreme Court  
 28 never considered the constitutional implications of Jury Instruction No. 19. ECF No. 66 at 57.

1 Accordingly, we conclude that the instruction did not mislead or confuse the jury  
2 and Arthur's due process rights were not violated.

3 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
4 unreasonable application of clearly established law as determined by the United States Supreme  
5 Court.

6 Jury Instruction No. 20 provides:

7 You are instructed that if you find that the State has established that the defendant  
8 has committed first degree murder you shall select first degree murder as your  
9 verdict. The crime of first degree murder includes the crime of second degree  
murder. You may find the defendant guilty of second degree murder if:

- 10 (1) some of you are not convinced beyond a reasonable doubt that the  
defendant is guilty of murder of the first degree, and
- 11 (2) all twelve of you are convinced beyond a reasonable doubt that the  
defendant is guilty of the crime of second degree murder.

12 If you are convinced beyond a reasonable doubt that the crime of murder has been  
13 committed by the defendant, but you have a reasonable doubt whether such murder  
14 was of the first or of the second degree, you must give the defendant the benefit of  
15 the doubt and return a verdict of murder of the second degree.

16 Arthur fails to demonstrate how Jury Instruction No. 20 is misleading or inadequate. The  
17 charge in this case instructed the jury to enter a verdict on first-degree murder only if they could  
18 unanimously agree that Arthur was guilty of first-degree murder. It did not instruct the jury  
19 impermissibly under Nevada law that it could consider second-degree murder only if jurors  
20 unanimously agreed that Arthur was not guilty of first-degree murder. See Green v. State, 80 P.3d  
21 93 (Nev. 2003) (rejecting the use of an "acquittal first" transition instruction and approving the use  
22 of an "unable to agree" transition instruction). Rather, if the jurors were unable to agree on a verdict  
23 on first-degree murder, they then could consider second-degree murder, without any requirement  
stating that they must first reach unanimous agreement as to the acquittal on first-degree murder.

1 This claim lacks any legal or factual foundation, whether on *de novo*<sup>9</sup> or deferential review. Arthur  
 2 is denied federal habeas relief for Ground 6.4.

3 **4. Jury Instruction No. 24**

4 Arthur argues that Jury Instruction No. 24, the unanimity instruction, improperly permitted  
 5 different jurors to reach the same conclusion based on different reasons and theories. In affirming  
 6 Arthur's conviction on direct appeal, the Nevada Supreme Court held:

7 Arthur argues that jurors are required to be unanimous regarding the theory of  
 8 liability. However, Arthur's argument fails as we have consistently held that  
 9 "[w]here the State proceeds on alternative theories of first-degree felony murder  
 10 and willful, deliberate, and premeditated first-degree murder, . . . the jury need not  
 11 unanimously agree on a single theory of the murder. Crawford v. State, 121 Nev.  
 12 744, 750, 121 P.3d 582, 586 (2005); see also Moore v. State, 116 Nev. 302, 304,  
 13 997 P.2d 793, 794 (2000); Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773  
 14 (1997). Arthur urges this court to revisit its position. We decline to do so and  
 15 conclude that the district court properly instructed the jury.

16 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
 17 unreasonable application of clearly established law as determined by the United States Supreme  
 18 Court.

19 Jury Instruction No. 24 provides:

20 Your verdict must be unanimous as to the charge. You do not have to be unanimous  
 21 on the principle of criminal liability. It is sufficient that each of you find beyond a  
 22 reasonable doubt that the murder, under any one of the principles of criminal  
 23 liability, was murder of the first degree.

24 A jury need only agree that a defendant committed the offense, and jurors may generally  
 25 base their conclusions on different theories of both the *actus reus* and *mens rea*. Schad v. Arizona,  
 26 501 U.S. 624, 632 (1991) (plurality opinion). Because the jury only needed to agree that Arthur  
 27

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28 <sup>9</sup> Arthur urges the Court to review this claim *de novo* because the Nevada Supreme merely  
 29 mentioned Franklin without applying it. ECF No. 66 at 59-60.

1 committed the offense of murder with the use of a deadly weapon, it was proper for the jurors to  
 2 have potentially based their conclusions on different theories of *mens rea*—either that Arthur acted  
 3 with premeditation and deliberation or that the killing occurred during the perpetration of a  
 4 burglary. Because this claim lacks any legal or factual foundation, whether on *de novo*<sup>10</sup> or  
 5 deferential review, Arthur is denied federal habeas relief for Ground 6.4.

6 **5. Jury Instruction No. 33**

7 Arthur argues that because no Nevada statute defines knives as deadly weapons, Jury  
 8 Instruction No. 33 directive that a knife is a deadly weapon eliminated the requirement that the  
 9 State prove the deadly weapon element beyond a reasonable doubt. In affirming Arthur's  
 10 conviction on direct appeal, the Nevada Supreme Court held:

11 Arthur next argues that jury instruction no. 33 violates his due process rights  
 12 because the instruction, not the jury, concludes that a knife is a deadly weapon. . . .

13 Although the first paragraph of jury instruction no. 33 follows the statutory  
 14 definition in NRS 193.165(6), it can be argued that the second paragraph  
 15 improperly displaces the fact-finding duty of the jury to decide whether the knife  
 16 in question was a deadly weapon. Nonetheless, we conclude that, based on the  
 17 evidence presented in this case, a rational trier of fact could have found that the  
 18 knife in question satisfied the statutory definition of a deadly weapon. Accordingly,  
 19 we conclude that Arthur has failed to demonstrate that any error in the jury  
 20 instruction violated his due process rights.

21 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
 22 unreasonable application of clearly established law as determined by the United States Supreme  
 23 Court.

Jury Instruction No. 33 provided:

“Deadly weapon” means any instrument which, if used in the ordinary manner  
 contemplated by its design and construction, will or is likely to cause substantial

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24 <sup>10</sup> Arthur urges the Court to review this claim *de novo* because the Nevada Supreme Court  
 25 failed to address his constitutional arguments. ECF No. 66 at 63.

1 bodily harm or death; any weapon, device, instrument, material or substance which,  
 2 under the circumstances in which it is used, attempted to be used or threatened to  
 be used, is readily capable of causing substantial bodily harm or death. You are  
 3 instructed that a knife is a deadly weapon.

4 Although Jury Instruction No. 33 may have been an erroneous statement of Nevada law,  
 5 as the Nevada Supreme Court noted, that is not enough to grant Arthur relief. Rather, he must  
 6 prove that Jury Instruction No. 33 “so infected the entire trial that the resulting conviction violates  
 7 due process.” Henderson, 431 U.S. at 154. Arthur fails to meet this burden. As the Nevada Supreme  
 8 Court reasonably determined, the jury could have rationally determined that the knife in question  
 9 met the statutory definition of a deadly weapon. See Nev. Rev. Stat. § 193.165(6) (defining “deadly  
 10 weapon” as “[a]ny instrument which, if used in the ordinary manner contemplated by its design  
 11 and construction, will or is likely to cause substantial bodily harm or death” or “[a]ny weapon,  
 12 device, instrument, material or substance which, under the circumstances in which it is used,  
 13 attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm  
 14 or death”). Indeed, at trial, it was not disputed that Arthur stabbed Andrade with a knife and that  
 15 Andrade died due to that stabbing. Because the Nevada Supreme Court reasonably denied Arthur  
 16 relief, Arthur is denied federal habeas relief for Ground 6.5.

17 **6. Jury Instruction No. 38**

18 Arthur argues that Jury Instruction No. 38, the reasonable doubt jury instruction,  
 19 improperly used the word “until” which lessened the state’s burden of proof in violation of his  
 20 constitutional rights. Arthur elaborates that “until” should have been removed or replaced with  
 21 “unless.” Id. In affirming Arthur’s conviction on direct appeal, the Nevada Supreme Court held:

22 In Arthur’s final challenge to the jury instructions, he contends that the use of the  
 23 word “until” in jury instruction no. 38 subverts the presumption of innocence and  
 reduces the State’s burden of proof. . . .

1 We have previously addressed a challenge to this specific jury instruction in Blake  
 2 v. State, 121 Nev. 779, 121 P.3d 567 (2005). In Blake, we determined that the  
 3 challenged instruction followed the express language of NRS 175.191 and did not  
 4 undermine the State's burden of proof or the presumption of innocence. Id. at 799,  
 5 121 P.3d at 580. Here, identical to the challenged jury instruction in Blake, jury  
 6 instruction no. 38 expressly tracks the language in Blake, jury instruction no. 38  
 7 expressly tracks the language of NRS 175.191, provides NRS 175.211's definition  
 8 of reasonable doubt, and concludes by instructing the jury that "[i]f you have a  
 9 reasonable doubt as to the guilt of the [d]efendant, he is entitled to a verdict of not  
 guilty." Therefore, we conclude that the jury was properly instructed and Arthur's  
 argument is without merit.

7 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
 8 unreasonable application of clearly established law as determined by the United States Supreme  
 9 Court.

10 Jury Instruction No. 38 provides:

11 The Defendant is presumed innocent until the contrary is proved. This presumption  
 12 places upon the state the burden of proving beyond a reasonable doubt every  
 13 material element of the crime charged and that the Defendant is the person who  
 14 committed the offense.

15 A reasonable doubt is one based on reason. It is not mere possible doubt but is such  
 16 a doubt as would govern or control a person in the more weighty affairs of life. If  
 17 the minds of the jurors after the entire comparison and consideration of all the  
 18 evidence, are in such a condition that they can say they feel an abiding conviction  
 19 of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable  
 20 must be actual, not mere possibility or speculation.

21 If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a  
 22 verdict of not guilty.

23 “[T]he Constitution does not require that any particular form of words be used in advising  
 24 the jury of the government's burden of proof. Rather, ‘taken as a whole, the instructions [must]  
 25 correctly conve[y] the concept of reasonable doubt to the jury.’” Victor v. Nebraska, 511 U.S. 1,  
 26 5 (1994) (internal citation omitted) (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).  
 27 In assessing the constitutionality of a jury instruction, it must be determined “whether there is a  
 28

1 reasonable likelihood that the jury understood the instructions to allow conviction based on proof  
 2 insufficient to meet the Winship standard.”<sup>11</sup> Id. at 6.

3 The Ninth Circuit evaluated a nearly identical reasonable doubt instruction in Ramirez v.  
 4 Hatcher.<sup>12</sup> 136 F.3d 1209, 1210-11 (9th Cir. 1998). The Ninth Circuit held that “[a]lthough [it did]  
 5 not herald the Nevada instruction as exemplary, [it] conclude[d] that the overall charge left the  
 6 jury with an accurate impression of the government’s heavy burden of proving guilt beyond a  
 7 reasonable doubt” such that “the jury charge satisfied the requirements of due process.” Id. at 1215;  
 8 see also Nevius v. McDaniel, 218 F.3d 940, 944 (9th Cir. 2000) (holding that the reasonable doubt  
 9 jury instruction was identical to the one in Ramirez, so “[t]he law of this circuit thus forecloses  
 10 Nevius’s claim that his reasonable doubt instruction was unconstitutional”). Because Jury  
 11 Instruction No. 38’s language has been determined to be constitutional by the Ninth Circuit, the  
 12 Nevada Supreme Court reasonably concluded that the jury was properly instructed regarding  
 13 reasonable doubt. Because the Nevada Supreme Court reasonably denied Arthur relief, Arthur is  
 14 denied federal habeas relief for Ground 6.6.<sup>13</sup>

15

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16 <sup>11</sup> The Winship standard states that “the Due Process Clause protects the accused against  
 17 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the  
 crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970).

17

18 <sup>12</sup> The only difference between the reasonable doubt jury instruction provided in Arthur’s  
 trial and the reasonable doubt jury instruction provided in Ramirez was the omission of the word  
 “substantial.” Compare ECF No. 31-2 at 39 (“. . . Doubt to be reasonable must be actual, not mere  
 possibility or speculation.”), with Ramirez v. Hatcher, 136 F.3d 1209, 1210-11 (9th Cir. 1998)  
 (“. . . Doubt to be reasonable must be actual *and substantial*, not mere possibility or speculation.”)  
 (emphasis added). However, because “the use of the term ‘substantial’ to describe reasonable  
 doubt has been disfavored,” Ramirez, 136 F.3d at 1212, the reasonable doubt jury instruction  
 provided in Arthur’s trial was even more acceptable than the reasonable doubt jury instruction in  
Ramirez.

19

20 <sup>13</sup> Arthur also argues that the jury instructions in Ground 6 combined to deprive him of his  
 21 constitutional rights. ECF No. 28 at 49; ECF No. 66 at 68. The Court disagrees, determining that  
 22 the cumulative impact of the instructions does not warrant the granting of relief for the reasons  
 23 discussed previously.

1           **G.      Ground 7**

2       In Ground 7, Arthur alleges that there was insufficient evidence to support his convictions.

3 Arthur explains that there was insufficient evidence to prove that he entered the Andrade home  
4 with the intent to commit a felony, so his burglary conviction cannot stand. And since the burglary  
5 was the predicate felony for the felony-murder allegation, the felony murder liability theory of  
6 first-degree murder cannot stand either. Arthur further alleges that there was insufficient evidence  
7 to prove premeditation and deliberation. In affirming Arthur's judgment of conviction, the Nevada  
8 Supreme Court held:

9       In this case, the record reflects that, although mostly circumstantial, the State  
10 presented evidence that Arthur was angry at the victim for hanging up the phone,  
11 that Arthur was banned from the victim's residence because of his drinking, that  
12 Arthur had previously stated that he was sent to kill the victim, and that he was seen  
13 in the area on the night of the murder. The State also presented evidence that Arthur  
14 knew that his children and their mother were not at home that evening, that Arthur's  
15 DNA was found throughout the house, that a struggle took place in the home, that  
16 the killing was of a violent and gruesome nature, and that Arthur attempted to clean  
17 the crime scene. And, finally, the State presented evidence showing that Arthur left  
18 the scene of the crime in the victim's vehicle, that he left a bottle of shampoo and  
19 latex gloves with blood stains in the trunk of the victim's car when he abandoned  
it, that he later fled from police, and he never notified anyone of the killing and  
later denied being involved or being at the victim's residence on the night of the  
murder. It was the jury's function to weigh the evidence and determine the  
credibility of the witnesses and decide whether Arthur's self-defense theory was  
plausible.

20      Based on the evidence in the record, and viewing that evidence in the light most  
21 favorable to the prosecution, we conclude that there is sufficient evidence from  
22 which a reasonable jury could reject Arthur's theory of self defense and find him  
guilty beyond a reasonable doubt.

23      The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
unreasonable application of clearly established law as determined by the United States Supreme  
Court.

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1        “[T]he Due Process Clause protects the accused against conviction except upon proof  
 2 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is  
 3 charged.” In re Winship, 397 U.S. 358, 364 (1970). A federal habeas petitioner “faces a heavy  
 4 burden when challenging the sufficiency of the evidence used to obtain a state conviction on  
 5 federal due process grounds.” Juan H. v. Allen, 408 F.3d 1262, 1274 (9th Cir. 2005). On direct  
 6 review of a sufficiency of the evidence claim, a state court must determine whether “any rational  
 7 trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”  
 8 Jackson v. Virginia, 443 U.S. 307, 319 (1979). The evidence is to be viewed “in the light most  
 9 favorable to the prosecution.” See id. Federal habeas relief is available only if the state-court  
 10 determination that the evidence was sufficient to support a conviction was an “objectively  
 11 unreasonable” application of Jackson. See Juan H., 408 F.3d at 1275 n.13.

12        Sufficiency of the evidence claims are judged by the elements defined by state law.  
 13 Jackson, 443 U.S. at 324 n.16. Nevada law defines murder as “the unlawful killing of a human  
 14 being . . . [w]ith malice aforethought, either express or implied.” Nev. Rev. Stat. § 200.010(1).  
 15 And, as it relates to the facts of this case, first-degree murder is murder “which is (a) Perpetrated  
 16 by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and  
 17 premeditated killing” or “(b) Committed in the perpetration or attempted perpetration of . . .  
 18 robbery, burglary, [or] invasion of the home.” Nev. Rev. Stat. § 200.030(1)(a), (b). Nevada law  
 19 does not require “that the jury . . . unanimously agree on a single theory of . . . murder.” Crawford  
 20 v. State, 121 P.3d 582, 586 (Nev. 2005). And Nevada law provides that burglary occurs when “a  
 21 person . . . by day or night, enters any house . . . with the intent to commit . . . assault or battery on  
 22 any person or any felony.” Nev. Rev. Stat. § 205.060.

23

1 The record in this case demonstrates that the State presented evidence that Arthur was not  
2 allowed to enter the Andrade home; that Arthur told a family member of Andrade that God had  
3 sent him to kill Andrade; that Arthur was upset at Andrade the night of the killing for hanging up  
4 the telephone on him while they were speaking; that Andrade knew that Taitano and her family  
5 members had gone out for the evening; that Andrade's killing was extremely brutal; that Arthur  
6 cleaned up the crime scene, disposed of his clothes, and moved Andrade's vehicle; that Arthur  
7 tried to evade law enforcement upon being stopped; that Arthur initially denied involvement in  
8 Andrade's killing and later alleged that he acted in self-defense; and that Arthur lied to a friend  
9 about being injured at a casino the night of the killing.

10 Although Arthur testified that he went to the Andrade's residence looking for Taitano and  
11 was invited inside by Andrade, viewing the foregoing evidence "in the light most favorable to the  
12 prosecution" (Jackson, 443 U.S. at 319), especially the fact that Arthur was upset at Andrade and  
13 knew he would be home alone, a rational trier of fact could have found beyond a reasonable doubt  
14 that Arthur entered the Andrade residence with the intent to commit a felony. And although Arthur  
15 testified that Andrade attacked him with a knife and he was forced to kill Andrade in self-defense,  
16 viewing the foregoing evidence "in the light most favorable to the prosecution" (Jackson, 443 U.S.  
17 at 319), especially considering the brutality of the killing and Arthur's questionable actions  
18 following the killing, a rational trier of fact could have found beyond a reasonable doubt that  
19 Arthur either killed Andrade willfully, deliberately and with premeditation or during the  
20 perpetration of burglarizing the Andrade home. As such, the Nevada Supreme Court's ruling that  
21 there was sufficient evidence to convict Arthur was reasonable. In re Winship, 397 U.S. at 364;  
22 Juan H., 408 F.3d at 1274; Jackson, 443 U.S. at 319; Nev. Rev. Stat. §§ 200.030, 205.060. Arthur  
23 is denied federal habeas relief for Ground 7.

1                   **H.        Ground 8**

2                   In Ground 8, Arthur argues that the cumulative errors raised in his direct appeal—Grounds  
3 1 through 7 of his federal habeas petition—violated his federal constitutional rights. The Court  
4 agrees. Beyond the bases for granting of relief previously found by the Court, the Court also finds  
5 that the cumulative effect of the errors warrants relief here. Specifically, due to the cumulative  
6 impact of the errors previously discussed in Grounds 2.2, 3, and 4, this Court grants Arthur federal  
7 habeas relief on this ground as well.

8                   **I.        Ground 9**

9                   In Ground 9, Arthur argues that his federal constitutional rights were violated due to the  
10 ineffectiveness of his trial counsel. In Strickland, the Supreme Court propounded a two-prong test  
11 for analysis of claims of ineffective assistance of counsel requiring the petitioner to demonstrate  
12 (1) that the attorney’s “representation fell below an objective standard of reasonableness,” and (2)  
13 that the attorney’s deficient performance prejudiced the defendant such that “there is a reasonable  
14 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have  
15 been different.” Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). A court considering a  
16 claim of ineffective assistance of counsel must apply a “strong presumption that counsel’s conduct  
17 falls within the wide range of reasonable professional assistance.” Id. at 689. The petitioner’s  
18 burden is to show “that counsel made errors so serious that counsel was not functioning as the  
19 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. Additionally, to establish  
20 prejudice under *Strickland*, it is not enough for the habeas petitioner “to show that the errors had  
21 some conceivable effect on the outcome of the proceeding.” Id. at 693. Rather, the errors must be  
22 “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687.

1 Where a state district court previously adjudicated the claim of ineffective assistance of  
 2 counsel under Strickland, establishing that the decision was unreasonable is especially difficult.  
 3 See Harrington, 562 U.S. at 104–05. In Harrington, the United States Supreme Court clarified that  
 4 Strickland and § 2254(d) are each highly deferential, and when the two apply in tandem, review is  
 5 doubly so. Id. at 105; see also Cheney v. Washington, 614 F.3d 987, 995 (9th Cir. 2010) (internal  
 6 quotation marks omitted) (“When a federal court reviews a state court’s Strickland determination  
 7 under AEDPA, both AEDPA and Strickland’s deferential standards apply; hence, the Supreme  
 8 Court’s description of the standard as doubly deferential.”). The Supreme Court further clarified  
 9 that, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable.  
 10 The question is whether there is any reasonable argument that counsel satisfied Strickland’s  
 11 deferential standard.” Harrington, 562 U.S. at 105.

12 The Court will now address Arthur’s three ineffective-assistance-of-trial-counsel claims.

13 **1. Elicitation of Arthur’s Silence**

14 Arthur argues that his trial counsel erred by eliciting the fact that he chose to remain silent  
 15 when law enforcement was interrogating him. Arthur explains that this prejudiced him because the  
 16 State was then able to suggest that the only way Arthur could be telling the truth about acting in  
 17 self-defense is if he had told investigating officers that at the time of his interrogation, rather than  
 18 doing what he did and exercising his right to remain silent. In affirming the denial of Arthur’s state  
 19 post-conviction petition, the Nevada Supreme Court held:

20 Arthur argues that trial counsel was ineffective in eliciting evidence that Arthur had  
 21 invoked his right to remain silent during police questioning. Arthur has failed to  
 22 demonstrate deficiency or prejudice. Trial counsel testified at the evidentiary  
 23 hearing that this was a tactical move to help the jurors credit Arthur’s testimony  
 that his actions were in self-defense even though he had never mentioned self-  
 defense before trial. Arthur cites no authority that prevents a defense attorney from  
 eliciting such evidence, and he has failed to demonstrate that this is one of the  
 extraordinary circumstances in which a tactical decision may be challenged. See

1       Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 280-81 (1996) (holding that  
 2 tactical decisions are “virtually unchallengeable absent extraordinary  
 3 circumstances” (quotation marks omitted)). Moreover, because counsel’s actions  
 4 were not error, Arthur has failed to demonstrate that, but for counsel’s error, there  
 5 was a reasonable probability of a different outcome at trial. We therefore conclude  
 6 that the district court did not err in denying this claim.

5       The Nevada Supreme Court’s rejection of Arthur’s Strickland claim was neither contrary to nor  
 6 an unreasonable application of clearly established law as determined by the United States Supreme  
 7 Court.

8       During Arthur’s trial counsel’s direct examination of him, Arthur testified about being  
 9 chased by law enforcement and taken into custody. Arthur testified that he told law enforcement  
 10 that he would “tell them everything if [he] g[o]t to speak with [his] wife, to have her come back.”  
 11 Taitano hung up the telephone when Arthur called and refused to come to the interview location.  
 12 Arthur’s trial counsel then asked Arthur, “[w]hat did you tell the police at that point,” and Arthur  
 13 replied, “I wanted to speak to a lawyer.” Arthur then answered in the negative when asked, “[n]o  
 14 further conversation, no further interrogation by the police, I take it?”

15       At the post-conviction evidentiary hearing, Arthur’s trial counsel stated that he meant to  
 16 ask Arthur the foregoing questions about invoking his right to an attorney and right to remain  
 17 silent, explaining:

18       The rationale is [Arthur] didn’t give any full explanation. I thought the State was  
 19 going to argue the first time you’ve ever heard about self-defense is here in court.  
 20 Nobody said anything at any point and I thought the lesser of two evils was to put  
 21 on the fact that he had invoked his right, he hadn’t said anything, he had a right to  
 22 counsel and to use that as a shield to some extent for him not giving a statement to the  
 23 police because it was glaringly obvious that he hadn’t given a statement to the  
 24 police.

25       Arthur’s trial counsel also commented:

26       In an optimum situation, if I’m going to have a self-defense case, I hope that the  
 27 client has told somebody that this was in self-defense, I was defending myself. It

1 makes it much easier then coming off the street and never mentioned that to  
 2 anybody before. When that doesn't happen, it becomes more difficult to couch  
 3 things because the obvious question in the jury's mind, regardless of what the judge  
 4 says, regardless of the instructions, the obvious question is always why didn't you  
 5 tell somebody if you were simply defending yourself.

...

4 In my experience in a self-defense case, one of the questions on the jury's mind is  
 5 always why didn't they tell somebody if they were defending themselves  
 6 irrespective of what the prosecution has.

7 It is accurate, as Arthur notes, that the government may not comment on a defendant's  
 8 post-arrest silence at trial. See Griffin v. California, 380 U.S. 609, 614 (1965); Doyle v. Ohio, 426  
 9 U.S. 610, 618 (1976) ("[I]t does not comport with due process to permit the prosecution during  
 10 the trial to call attention to [a defendant's] silence at the time of arrest and to insist that because he  
 11 did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable  
 12 inference might be drawn as to the truth of his trial testimony.""). But, as the Nevada Supreme  
 13 Court reasonably noted, Arthur fails to cite any caselaw demonstrating that his own counsel was  
 14 deficient for making such a comment. Rather, Arthur's trial counsel's testimony at the post-  
 15 conviction evidentiary hearing made it clear that it was a strategic decision to discuss Arthur's  
 16 right to remain silent, as it addressed why Arthur failed to mention that he acted in self-defense at  
 17 the time of his law enforcement interview. See Harrington, 562 U.S. at 107 (2011) ("Counsel was  
 18 entitled to formulate a strategy that was reasonable at the time."). This was a sound tactical  
 19 decision. Because the Nevada Supreme Court reasonably determined that Arthur's trial counsel  
 20 was not deficient, Strickland, 466 U.S. at 688, Arthur is denied federal habeas relief for Ground  
 21 9.1.

22 **2. Conceding Guilt**

23

1 Arthur argues that his trial counsel erred by conceding that Arthur was guilty of voluntary  
 2 manslaughter. In affirming the denial of Arthur's state post-conviction petition, the Nevada  
 3 Supreme Court held:

4 Arthur argues that trial counsel was ineffective in conceding his guilt at trial. The  
 5 district court's finding that Arthur's claim was belied by the record is supported by  
 6 substantial evidence in the record. The statement Arthur highlights was part of a  
 7 larger argument that he acted in self-defense or, if the jury did not believe that, then  
 8 that he committed only voluntary manslaughter. We therefore conclude that the  
 9 district court did not err in denying this claim. See Hargrove v. State, 100 Nev. 498,  
 10 503, 686 P.2d 222, 225 (1984) (concluding no relief warranted where claims are  
 11 belied or repelled by the record).

12 The Nevada Supreme Court's rejection of Arthur's Strickland claim was neither contrary to nor  
 13 an unreasonable application of clearly established law as determined by the United States Supreme  
 14 Court.

15 Arthur takes issue with the italicized portion of his trial counsel's closing argument:

16 Reasonable minds can differ. The real key question here is whether if you think this  
 17 went beyond self-defense, there's reasonable provocation, and whether or not a  
 18 reasonable person, any reasonable person in George's position would have acted  
 19 on and used deadly force. *If you think so, if you don't think the State has proven the  
 20 contrary, actually, then what we're talking about is voluntary manslaughter, even  
 21 if you set self-defense aside. But self-defense is there in the instructions.*

22 At the post-conviction evidentiary hearing, Arthur's trial counsel stated that he made this comment  
 23 because "in a case like this, you're hoping for a compromised verdict a lot of times." Arthur's trial  
 24 counsel elaborated that he was not conceding guilt by this statement; rather, he was giving the jury  
 25 another option besides first-degree murder because he did not "have high hopes for a not guilty  
 26 because of self-defense" verdict due to the brutality of the killing.

27 "An attorney undoubtedly has a duty to consult with the client regarding 'important  
 28 decisions,' including questions of overarching defense strategy." Florida v. Nixon, 543 U.S. 175,

1 187 (2004); see also *Strickland*, 466 U.S. at 688 (noting counsel's duty to consult with the  
2 defendant on important decisions). However, as the Nevada Supreme Court reasonably  
3 determined, the facts do not support Arthur's contention that his trial counsel conceded guilt,  
4 thereby violating his duty of consultation. Arthur's trial counsel spent considerable time during his  
5 closing argument focusing on self-defense. His one sentence comment that voluntary manslaughter  
6 was another option to consider—indeed, it was one of the seven options available on the verdict  
7 form for the murder count does not amount to a concession of guilt. Thus, even if the Court were  
8 to evaluate this claim *de novo* as Arthur urges, see ECF No. 66 at 78, it cannot be determined that  
9 Arthur's trial counsel acted deficiently. *Strickland*, 466 U.S. at 688. Arthur is denied federal habeas  
10 relief for Ground 9.2.

11                   **3. Failure to Investigate**

12                   Arthur argues that his trial counsel failed to obtain psychological information and a  
13 psychological examination of him, to investigate Lori Rios, and to investigate Andrade's violent  
14 background. Defense counsel has a "duty to make reasonable investigations or to make a  
15 reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691.  
16 Additionally, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly  
17 assessed for reasonableness in all the circumstances, applying a heavy measure of deference to  
18 counsel's judgments." *Id.* This investigatory duty includes investigating the defendant's "most  
19 important defense," *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994), and investigating and  
20 introducing evidence that demonstrates factual innocence or evidence that raises sufficient doubt  
21 about the defendant's innocence. *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999). When the  
22 record demonstrates that trial counsel was well-informed, and the defendant fails to provide what  
23

1 additional information would have been gained by the investigation he now claims was necessary,  
 2 an ineffective assistance claim fails. Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986).

3 **a. Psychological Information and Examination**

4 Arthur argues that his trial counsel failed to obtain psychological information and a  
 5 psychological examination of him. Arthur explains that had his trial counsel taken the minimal  
 6 steps to uncover his mental condition, they could have presented a different defense, arguing that  
 7 his mental illness made it impossible for him to form the specific intent to commit burglary or  
 8 murder. In reversing the original granting of Arthur's state post-conviction petition, the Nevada  
 9 Supreme Court held:

10 [T]he State argues that the district court erred in determining that Arthur's trial  
 11 counsel were ineffective for failing to investigate Arthur's mental health prior to  
 12 trial. In support of this claim, Arthur produced documents stemming from his  
 13 pretrial confinement in the Clark County Detention Center that briefly discuss his  
 14 treatment for mental health issues. The district court concluded that counsel were  
 15 ineffective for failing to obtain Arthur's jail records, which would have revealed  
 16 that Arthur had mental health issues, and that such revelation would have prompted  
 17 counsel to pursue a different defense. At the evidentiary hearing, the parties  
 18 discussed the potential for an insanity defense based in part on the jail records.

19 We conclude that the district court erred in concluding that counsel's performances  
 20 were deficient. At the evidentiary hearing, counsel discussed their pretrial  
 21 investigation and decisions concerning self-defense in this case. First, the lead  
 22 counsel testified that he makes a case-by-case consideration of whether to request  
 23 records pertaining to a client from the jail, the jail sends a copy of those records to  
 the State and that such records often contain information damaging to the defense.  
 Counsel testified that such concerns would have been why he did not request  
 Arthur's records from the Clark County Detention Center. Second, counsel testified  
 that Arthur was adamant that he killed the victim in self-defense and counsel  
 pursued investigations aimed at helping that defense.

24 As discussed previously, defense counsel has a duty to make reasonable  
 25 investigations or make a reasonable decision not to undertake a particular course of  
 investigation. Love, 109 Nev. at 1138, 865 P.2d at 323. Here, counsel made a  
 reasonable tactical decision regarding the direction of the pretrial investigation  
 based on his experience and upon the circumstances known to him in this case.  
 Tactical decisions made by counsel, such as the decision not to obtain jail records,  
 "are virtually unchallengeable absent extraordinary circumstances," Ford, 105 Nev.

1 at 853, 784 P.2d at 953, and Arthur does not demonstrate extraordinary  
 2 circumstances here.

3 Counsel also reasonably declined to investigate facts to support an insanity defense.  
 4 As stated previously, defense counsel testified that Arthur was adamant that the  
 5 killing was done in self-defense. Counsel testified that they both met with Arthur  
 6 prior to trial and had no indication from him that he suffered from any delusion  
 7 during the commission of the killing such that they should have pursued an insanity  
 8 defense. This is particularly important in light of this court's conclusion that a  
 9 criminal defendant personally, and not his or her counsel, has the authority to  
 10 pursue a defense of insanity. See Johnson v. State, 117 Nev. 153, 163, 17 P.3d 1008,  
 11 1015 (2001). Moreover, where there is no indication pretrial that a criminal  
 12 defendant suffered from psychological disorders that may have impaired his mental  
 13 state at the time of the crime, counsel is not ineffective for declining to investigate  
 14 the defendant's mental health. See Riley v. State, 110 Nev. 638, 650-51, 878 P.2d  
 15 272, 280 (1994); see also Dumas v. State, 111 Nev. 1270, 1272, 903 P.2d 816, 817  
 16 (1995) (explaining that the circumstances in that case should have caused counsel  
 17 to investigate the defendant's mental health, but recognizing that defense counsel  
 18 may have "cogent reasons for not pursuing the defendant's psychopathy"). Under  
 19 the circumstances of this case, the pursuit of facts to support Arthur's statements  
 20 that the killing was done in self-defense was a reasonable tactical decision given  
 21 the facts known to counsel and Arthur's assertion that he acted in self-defense. See  
Ford, 105 Nev. at 853, 784 P.2d at 953; see also Strickland, 466 U.S. at 691 ("The  
 22 reasonableness of counsel's actions may be determined or substantially influenced  
 23 by the defendant's own statements or actions").

14 The district court also erred in concluding that Arthur was prejudiced by trial  
 15 counsel's failure to investigate Arthur's mental health prior to trial. Arthur had the  
 16 burden of proving the factual allegations underlying his ineffective-assistance-of-  
 17 counsel claims by a preponderance of the evidence. See Means v. State, 120 Nev.  
 18 1001, 1012, 103 P.3d 25, 33 (2004). In support of this claim, Arthur provided the  
 19 previously mentioned jail records that briefly discussed Arthur's diagnoses and  
 20 medications. Arthur also provided Nevada Department of Corrections inmate  
 21 request forms where he had requested information regarding his medication and  
 22 diagnoses. However, Arthur did not present expert testimony regarding his mental  
 23 health at the evidentiary hearing. The district court did not make specific findings  
 about Arthur's proof regarding mental health difficulties, but stated in its order and  
 at the evidentiary hearing that had counsel obtained the jail records, counsel may  
 have pursued a different defense at trial, such as an insanity defense.

21 Arthur's jail and prison documents fail to demonstrate by a preponderance of the  
 22 evidence that during the killing he was "in a delusional state preventing him from  
 23 knowing or understanding the nature of his act or from appreciating the  
 wrongfulness of his act." Blake, 121 Nev. at 793, 121 P.3d at 576. None of the  
 records provided by Arthur on post-conviction discuss in any detail his mental  
 difficulties or provide any information regarding whether Arthur actually acted in

1 a delusional state during the killing. See Miller v. State, 112 Nev. 168, 172, 911  
2 P.2d 1183, 1185 (1996) (stating “a successful insanity defense must show the  
3 elements of [legal insanity] existed at the time of the act”). The general and brief  
4 information produced by Arthur simply fails to demonstrate a reasonable  
5 probability that a jury would have found Arthur not guilty by reason of insanity had  
6 counsel obtained this information. To the extent that the jail records could have  
7 prompted further investigation into Arthur’s mental health, the record is silent as to  
8 what counsel could have discovered, if anything. Arthur has not addressed the type  
9 or quality of mental evidence his counsel could have uncovered with more  
10 investigation, and therefore, he fails to demonstrate a reasonable probability of a  
11 different outcome had counsel conducted further investigation into his mental  
12 health. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Therefore,  
13 the district court erred in granting relief on this claim.

14 The Nevada Supreme Court’s rejection of Arthur’s Strickland claim was neither contrary to nor  
15 an unreasonable application of clearly established law as determined by the United States Supreme  
16 Court.

17 It appears that Arthur suffered from a variety of mental health issues prior to and following  
18 his trial. In fact, prior to his trial, Arthur filled out an inmate request form indicating that he needed  
19 medication for his “bipolar disease.” There were also indications that Arthur was suffering from  
20 auditory and visual hallucinations. Following his conviction, it was reported that Arthur suffered  
21 from schizophrenia and depression.

22 Arthur’s first-chair and second-chair trial counsel testified at the post-conviction  
23 evidentiary hearing that they were not concerned with Arthur’s competency or any psychological  
24 issues such that a psychological examination needed to be requested. However, if Arthur’s first-  
25 chair trial counsel had seen Arthur’s jail records showing that he needed medication for his bipolar  
26 condition and was suffering from hallucinations, he would have explored “a mental health angle”  
27 by “probably sen[ding] a doctor over to talk with [Arthur].” That being said, Arthur’s first-chair  
28 trial counsel would not have expected that investigation to have “ma[d]e any difference on how  
29 [he] defended the case” because he believed that “the alcohol in this case was more helpful than

1 [any] evidence of delusions and hallucinations.”. This assessment was due to the fact that Nevada  
 2 law doesn’t recognize diminished capacity and Arthur’s mental health issues would not have been  
 3 enough to argue insanity, “[s]o putting [Arthur] on to say that he’s delusional, crazy, whatever  
 4 else” would only act to “undermine his credibility” and weaken his testimony that he acted in self-  
 5 defense. And in this case, Arthur was “adamant that he wanted to go with self-defense.”

6 The Nevada Supreme Court reasonably determined that Arthur’s trial counsel were not  
 7 deficient. Strickland, 466 U.S. at 688. As the Nevada Supreme Court reasonably noted, Arthur’s  
 8 trial counsel reasonably decided to pursue facts that would support Arthur’s assertion that he acted  
 9 in self-defense. See Tuck v. White, 116 F.3d 1264 (9th Cir. 1997) (“[O]nce [counsel] reasonably  
 10 selected the self-defense theory, his duty to investigate the competency defense, which directly  
 11 conflicted with the self-defense theory, ended.”). Indeed, Arthur’s trial counsel soundly explained  
 12 that investigating and presenting a mental health issue not amounting to a lack of competency  
 13 would only have diminished Arthur’s testimony that he acted in self-defense. Strickland, 466 U.S.  
 14 at 691; see also Harrington, 562 U.S. at 109 (explaining that “[c]ounsel was entitled to formulate  
 15 a strategy that was reasonable at the time and to balance limited resources in accord with effective  
 16 trial tactics and strategies”). Because the Nevada Supreme Court reasonably denied Arthur’s  
 17 ineffective-assistance-of-counsel claim, Arthur is denied federal habeas relief for Ground 9.3(a).

18                   **b.           Rios**

19 Arthur argues that his trial counsel failed to investigate Rios, whose testimony was  
 20 discussed in Ground 3. Arthur elaborates that if his trial counsel had investigated Rios, they would  
 21 have learned about her damaging testimony before trial and, more importantly, based on the  
 22 statements he allegedly made to Rios, they would have learned about and explored his mental  
 23

1 health. In reversing the original granting of Arthur's state post-conviction petition, the Nevada  
 2 Supreme Court held:

3 [T]he State argues that the district court erred in determining that Arthur's trial  
 4 counsel were ineffective for failing to investigate and interview a State's witness,  
 5 Lori Rios. The State endorsed Rios as a witness, but listed her contact information  
 6 as unknown. At the evidentiary hearing, defense counsel testified that they  
 7 discussed Rios with the State in an effort to ascertain whether they should pursue  
 8 further investigation of her potential testimony and whether the State actually  
 9 possessed her contact information. During that conversation, the State informed  
 10 counsel that the State had only listed Rios as a witness out of an abundance of  
 11 caution as she was a family member of the victim who resided in Las Vegas and  
 12 possibly could have pertinent information about the crime. The State reiterated to  
 13 defense counsel that it did not possess Rios' contact information and informed  
 14 defense counsel that the State was not likely to present Rios' testimony at trial.  
 15 Defense counsel also conferred with Arthur, who indicated that he did not believe  
 16 that Rios had any pertinent information. Defense counsel testified that, as a result  
 17 of the conversations with the State and Arthur, they did not pursue further  
 18 investigation of Rios' potential testimony.

19 Rios, however, attended the trial and during a break, a prosecutor spoke with Rios  
 20 and learned that approximately one month prior to the killing, Arthur had told her  
 21 that God had sent him to kill the victim. Defense counsel objected to Rios'  
 22 testimony due to the lack of contact information and the objection was overruled  
 23 by the district court. Counsel then cross-examined Rios at length regarding her  
 24 failure to disclose this information to the State or the police at any point prior to the  
 25 trial. The State argued in closing that Rios' testimony, combined with the additional  
 26 evidence presented at trial, demonstrate that Arthur acted with premeditation and  
 27 did not kill the victim in self-defense.

28 The district court concluded that counsel was ineffective for failing to pursue  
 29 further investigation of Rios and her potential testimony. The district court's order  
 30 states that had counsel been aware that Arthur had told Rios that God wanted him  
 31 to kill the victim, counsel would have been aware of Arthur's psychological  
 32 difficulties and chosen to pursue a difference defense. At the evidentiary hearing,  
 33 the parties discussed the potential for an insanity defense based in part on Rios'  
 34 testimony that Arthur was told to kill by God.

35 We conclude that the district court erred in concluding that counsel's performances  
 36 were deficient. “[D]efense counsel has a duty ‘to make reasonable investigations or  
 37 to make a reasonable decision that makes particular investigations unnecessary.’”  
 38 State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland,  
 39 466 U.S. at 691). Defense counsel's “particular decision not to investigate must be  
 40 directly assessed for reasonableness in all the circumstances.” Strickland, 466 U.S.  
 41 at 691. “Where counsel and the client in a criminal case clearly understand the

1 evidence and the permutations of proof and outcome, counsel is not required to  
 2 unnecessarily exhaust all available public or private resources.” Molina v. State,  
 3 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Here, defense counsel testified that  
 4 they questioned the State regarding Rios’ potential testimony and her contact  
 5 information and relied upon the State’s assertions that Rios was unlikely to testify  
 6 as the State did not know at that time the value of Rios’ testimony or how to contact  
 7 her. Arthur also told them that he did not believe that Rios knew any important  
 8 information. In addition, counsel testified that Arthur was adamant that he acted in  
 9 self-defense. Given the representations by the State and Arthur, counsel chose not  
 10 to spend additional time and resources investigating a witness who, given the  
 11 information known to counsel before the start of trial, did not appear to possess  
 12 helpful or pertinent information. Tactical decisions made by counsel, such as which  
 13 witnesses to interview or investigate, “are virtually unchallengeable absent  
 14 extraordinary circumstances.” Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953  
 15 (1989). Under these circumstances, defense counsel’s decision to not spend time  
 16 and effort on investigating a witness for whom the State did not possess contact  
 17 information, that the State did not intend to call at trial, and that the defendant did  
 18 not believe had useful information was an objectively reasonable decision.

19 The district court also erred in concluding that Arthur was prejudiced by the failure  
 20 to investigate Rios as her testimony regarding Arthur’s statement about God telling  
 21 him to kill the victim would not have supported an insanity defense. “To be legally  
 22 insane, a defendant must be in a delusional state preventing him from knowing or  
 23 understanding the nature of his act or from appreciating the wrongfulness of his  
 1 act.” Blake v. State, 121 Nev. 779, 793, 121 P.3d 567, 576 (2005); see also NRS  
 174.035(5) (codifying Nevada’s standard for legal insanity). Nevada’s legal  
 2 insanity standard

3 Permits a finding of legal insanity only if at the time of the killing,  
 4 a delusional state: (1) rendered the defendant incapable of knowing  
 5 or understanding the nature of his act, *i.e.*, that he was killing a  
 6 human being, or (2) prevented the defendant from appreciating the  
 7 wrongfulness of his act, *i.e.*, that the killing was not justified under  
 8 the law.

9 Blake, 121 Nev. at 801-02, 121 P.3d at 581 (Becker, C.J., concurring in part and  
 10 dissenting in part). Arthur’s statements to Rios that God sent him to kill the victim  
 11 does not meet either requirement for insanity. It did not demonstrate that Arthur  
 12 was rendered incapable of knowing the nature of his act as he specifically stated he  
 13 was sent to kill a human being. It also did not demonstrate that Arthur did not  
 14 appreciate the wrongfulness of his acts or that the killing was not justified under  
 15 the law. Arthur’s statement best fits under the irresistible impulse test for legal  
 16 insanity, a standard specifically not adopted by Nevada. See Finger v. State, 117  
 17 Nev. 548, 558, 27 P.3d 66, 73 (2001). Moreover, this court has already concluded  
 18 that a scenario similar to the one presented in this case, one where a criminal  
 19 defendant believed that God wanted him to kill and acted under that impulse, would  
 20 not meet Nevada’s legal insanity standard. See id. Accordingly, the district court

1 erred in concluding that there is a reasonable probability of a different outcome at  
2 trial had counsel investigated Rios.

3 The Nevada Supreme Court’s rejection of Arthur’s Strickland claim was neither contrary to nor  
4 an unreasonable application of clearly established law as determined by the United States Supreme  
5 Court.

6 Arthur’s first-chair trial counsel testified at the post-conviction evidentiary hearing that he  
7 did not know the substance of Rios’ testimony until she testified and that he “felt ambushed.”  
8 Arthur’s second-chair trial counsel elaborated that the State had “told [them] that [Rios] was  
9 merely a member of the family and [the State was] just noticing her in an abundance of caution  
10 [and] that they had no idea what she was gonna [sic] say.” The State also told Arthur’s trial counsel  
11 that it did not have Rios’ contact information and/or telephone number. In an effort to further  
12 investigate, Arthur’s trial counsel asked him if he knew why Rios would be on the State’s witness  
13 list, and Arthur responded that he did not “remember saying anything to her” and did not know  
14 “why she would ever testify.”

15 The Nevada Supreme Court reasonably determined that Arthur’s trial counsel were not  
16 deficient. Strickland, 466 U.S. at 688. As the Nevada Supreme Court reasonably noted, Arthur’s  
17 trial counsel contacted the State about Rios’ potential testimony, attempted to get Rios’ contact  
18 information, and questioned Arthur about Rios’ potential testimony. Because the State told  
19 Arthur’s trial counsel that Rios was only being noticed out of an abundance of caution and because  
20 Arthur did not inform his trial counsel that Rios would have anything damaging to say at trial, it  
21 was reasonable for Arthur’s trial counsel to have decided not to investigate further. Strickland, 466  
22 U.S. at 691; see also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment  
23 guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”).

1 Because the Nevada Supreme Court reasonably denied Arthur's ineffective-assistance-of-counsel  
 2 claim, Arthur is denied federal habeas relief for Ground 9.3(b).

3 **c. Andrade's Background**

4 Arthur argues that his trial counsel should have investigated Andrade's violent background  
 5 to help support Arthur's claim of self-defense. In reversing the original granting of Arthur's state  
 6 post-conviction petition, the Nevada Supreme Court held:

7 [T]he State argues that the district court erred in determining that Arthur's trial  
 8 counsel were ineffective for failing to investigate the victim's violent background.  
 9 Evidence presented at the evidentiary hearing demonstrated that the victim had  
 10 been arrested approximately 20 years prior to his death for battery, that the defense  
 11 knew of his arrest, but that the defense did not present this evidence during the trial  
 12 because the trial court had informed them in an off-the-record discussion that it  
 13 would permit the State to introduce Arthur's violent background if they sought  
 admission of this evidence. Evidence presented at the evidentiary hearing also  
 indicated that Arthur had been aware of the victim's arrest prior to the night of the  
 killing. The district court concluded that counsel were ineffective for failing to  
 investigate the victim's violent background and for failing to ensure that the trial  
 court's ruling on this evidence was placed on the record so as to be preserved for  
 direct appeal.

14 We conclude that the district court erred in concluding that counsel's performances  
 15 were deficient. The record belies Arthur's claim that counsel did not investigate the  
 16 victim's violent background. At the evidentiary hearing, counsel testified that they  
 17 investigated the victim's criminal history and the defense knew that the victim had  
 18 been arrested for battery. Counsel also testified that the trial court's ruling  
 19 essentially tied their hands. They knew of Arthur's criminal history, which was  
 20 much more recent and much more significant than the victim's history. Counsel in  
 21 particular did not want the jury to hear about Arthur's domestic violence toward  
 Arthur's common-law wife, the victim's step-daughter. Accordingly, counsel made  
 a tactical decision not to seek admission of the victim's use of violence in an attempt  
 to shield from the jury Arthur's past violent conduct. Under the circumstances of  
 this case and the [sic] given the ruling made by the trial court, these were reasonable  
 tactical decisions. Ford, 105 Nev. at 853, 784 P.2d at 953. Therefore, the district  
 court erred in concluding that counsel were not reasonably diligent with respect to  
 use of evidence pertaining to the victim's violent background.

22 The district court also erred in concluding that Arthur was prejudiced by the failure  
 23 to investigate the victim's violent background and for failing to challenge the trial  
 court's ruling with respect to introduction of this evidence. As stated previously,  
 defense counsel knew of the victim's arrest for battery and Arthur does not

1 demonstrate that there were any additional violent incidents involving the victim  
 2 that could have been discovered. See Molina, 120 Nev. at 192, 87 P.3d at 538. Had  
 3 counsel sought to introduce evidence of the victim's battery arrest, Arthur does not  
 4 demonstrate that there was a reasonable probability of a different outcome at trial.  
 The victim's use of violence was remote and not likely to have held much  
 persuasive weight given that the charge did not result in a conviction. In contrast,  
 the evidence demonstrating Arthur's guilt was strong.

5 Evidence produced at trial demonstrated that Arthur was not welcome inside of his  
 6 estranged wife's home due to his alcoholism and that the victim had initiated those  
 7 restrictions. Arthur talked to his estranged wife on the night of the murder and she  
 8 testified that Arthur was angry at the victim due to an earlier phone call between  
 9 the two. The evidence demonstrated that Arthur went to the victim's house while  
 10 the rest of the family was out, that the victim suffered multiple and significant stab  
 11 wounds to his head, back and neck, and that the victim had extensive defensive  
 12 wounds. The assailant had attempted to clean the scene following the incident and  
 13 Arthur's blood was discovered throughout the crime scene. Arthur then took the  
 victim's car, left it a short distance from the house, and left the area in his own  
 vehicle. The next day, Arthur met with an acquaintance and told that person that he  
 had been in an altercation at a casino with two African Americans the night before.  
 A few days later, police officers initiated a traffic stop of Arthur, but he led them  
 on a high speed chase of approximately 40 miles with speeds exceeding 100 mph.  
 After his arrest, Arthur was recorded telling his estranged wife that he had had  
 nothing to do with her step-father's death, but asserted that he acted in self-defense  
 at trial.

14 In light of the evidence of Arthur's guilt, the victim's 20-year-old battery arrest that  
 15 did not result in a conviction had little probative value in determining the events of  
 16 the night in question. Accordingly, Arthur does not demonstrate prejudice  
 stemming from counsel's actions or inactions regarding the victim's battery arrest.  
 Therefore, the district court erred in granting relief on this claim.

17 The Nevada Supreme Court's rejection of Arthur's Strickland claim was neither contrary to nor  
 18 an unreasonable application of clearly established law as determined by the United States Supreme  
 19 Court.

20 Andrade was charged with a misdemeanor battery in California in 1987, but the charge was  
 21 dismissed. Arthur's first-chair trial counsel testified at the post-conviction evidentiary hearing that  
 22 this battery charge may have had some value at Arthur's trial, but he did not want to introduce it  
 23 to the jury for fear of hurting his credibility since he lacked proof of the battery's existence. Indeed,

1 Arthur's second-chair trial counsel testified that although Arthur told them about Andrade's  
 2 criminal issue, they were unable to find any record of the charge through the research tools  
 3 available to them. And Arthur's first-chair trial counsel explained that they did not research the  
 4 charge further because "it was 20 years old and there was no conviction." Further, Arthur's second-  
 5 chair trial counsel indicated that he "got the impression from [the state district court] that if [they]  
 6 brought up [Andrade's] violent history, the State would be allowed to bring in [Arthur's] violent  
 7 history." This pronouncement was concerning to defense counsel because "a misdemeanor battery  
 8 in California [was] not worth risking [Arthur's] violent history coming into th[e] case."

9 The Nevada Supreme Court reasonably determined that Arthur's trial counsel were not  
 10 deficient. Strickland, 466 U.S. at 688. As the Nevada Supreme Court reasonably noted, Arthur's  
 11 trial counsel attempted to research Andrade's battery charge and ultimately decided that  
 12 introducing this evidence would do more harm than good in light of the state district court's  
 13 announcement that it would allow the State to admit Arthur's violent past conduct if Arthur  
 14 introduced Andrade's battery. This was a sensible decision, especially considering that Andrade's  
 15 battery was more than twenty years old and was dismissed. Because the Nevada Supreme Court  
 16 reasonably denied Arthur's ineffective-assistance-of-counsel claim, Arthur is denied federal  
 17 habeas relief for Ground 9.3(a).<sup>14</sup>

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<sup>14</sup> Arthur argues that although it may have been reasonable for his trial counsel to have refrained from introducing Andrade's battery charge due to the state district court's indication that it would open the door for Arthur's violent conduct to be admitted, this strategy transformed into an unreasonable one when Arthur's violent conduct was admitted anyway through Taitano's testimony. ECF No. 66 at 93-94. As was explained further in Ground 2.1, Taitano testified that Arthur would sometimes become violent and put his hands on her when he was intoxicated. See ECF No. 30-1 at 9. Although this evidence of Arthur's past conduct was admitted, it was limited, and specific instances were not mentioned. It is, therefore, unfair to state that Arthur's trial counsel's strategy in refraining from introducing Andrade's dismissed battery charge was no longer valid.

## 4. Cumulative Error

2 Arthur argues that the cumulative errors of his trial counsel's ineffectiveness entitle him to  
3 relief. In reversing the original granting of Arthur's state post-conviction petition, the Nevada  
4 Supreme Court held:

[T]he State argues that the district court erred in determining that the cumulative errors of counsel amounted to ineffective assistance of counsel. As discussed previously, we conclude that Arthur did not meet his burden below to demonstrate that his trial counsel's performances were deficient. Therefore, there are no claims of counsel error to consider cumulatively and Arthur was not entitled to relief for this claim.

9 Because Arthur has failed to demonstrate that his trial counsel acted deficiently, there are no errors  
10 to accumulate, and the Nevada Supreme Court reasonably denied Arthur relief.<sup>15</sup>

## J. Ground 11

12 In Ground 11, Arthur argues that his federal constitutional rights were violated due to the  
13 ineffectiveness of his appellate counsel. The Strickland standard outlined in Ground 9 is also  
14 utilized to review appellate counsel's actions: a petitioner must show "that [appellate] counsel  
15 unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them" and  
16 then "that, but for his [appellate] counsel's unreasonable failure to file a merits brief, [petitioner]  
17 would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000). The Court will  
18 now address Arthur's three ineffective-assistance-of-appellate-counsel claims.

## 1. Elicitation of Arthur's Silence

20 Arthur argues that his appellate counsel failed to raise a claim on direct appeal that the  
21 elicitation of his guilt by his trial counsel was unconstitutional. Arthur explains that by failing to  
22 raise this claim on direct appeal, he was forced to raise it as an ineffective-assistance-of-counsel

<sup>15</sup> Ground 10 will be discussed with Ground 11.3.

1 claim in his post-conviction petition, thereby requiring that he meet a more difficult test. In  
 2 affirming the denial of Arthur's state post-conviction petition, the Nevada Supreme Court held:

3 Arthur argues that appellate counsel was ineffective for not arguing on appeal that  
 4 trial counsel had elicited Arthur's invocation of his right to remain silent . . . For  
 5 the reasons discussed previously, Arthur failed to demonstrate that appellate  
 6 counsel was deficient or that he was prejudiced. To the extent Arthur argues that  
 7 appellate counsel was ineffective for failing to raise claims of ineffective assistance  
 8 of trial counsel, we disagree. See Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d  
 9 519, 534 (2001) (noting that claims of ineffective assistance of trial counsel are  
 10 generally inappropriate on direct appeal). We therefore conclude that the district  
 11 court did not err in denying these claims.

12 As the Court noted in Ground 9.1, Arthur fails to cite any caselaw demonstrating that his  
 13 own trial counsel—rather than the government—violated his constitutional rights when he  
 14 commented on his post-arrest silence at trial. Because this legal issue lacks merit, the Nevada  
 15 Supreme Court reasonably determined that Arthur's appellate counsel was not deficient for not  
 16 including it in his direct appeal. Smith, 528 U.S. at 285. Arthur is denied federal habeas relief for  
 17 Ground 11.1.

18 **2. Conceding Guilt**

19 Arthur argues that his appellate counsel failed to raise a claim on direct appeal that the  
 20 concession of Arthur's guilt by his trial counsel was unconstitutional. Arthur explains that by  
 21 failing to raise this claim on direct appeal, he was forced to raise it as an ineffective-assistance-of-  
 22 counsel claim in his post-conviction petition, requiring that he meet a more difficult test. In  
 23 affirming the denial of Arthur's state post-conviction petition, the Nevada Supreme Court held:

24 Arthur argues that appellate counsel was ineffective for not arguing on appeal that  
 25 trial counsel . . . conceded Arthur's guilt without first obtaining permission. For the  
 26 reasons discussed previously, Arthur failed to demonstrate that appellate counsel  
 27 was deficient or that he was prejudiced. To the extent Arthur argues that appellate  
 28 counsel was ineffective for failing to raise claims of ineffective assistance of trial  
 29 counsel, we disagree. See Pellegrini v. State, 117 Nev. 860, 882-83, 34 P.3d 519,  
 30 534 (2001) (noting that claims of ineffective assistance of trial counsel are generally

1 inappropriate on direct appeal). We therefore conclude that the district court did not  
2 err in denying these claims.

3 As the Court noted in Ground 9.2, the facts do not support Arthur's contention that his trial  
4 counsel conceded guilt. Instead, Arthur's trial counsel merely commented that voluntary  
5 manslaughter was another option for the jury to consider. Because this legal issue lacks merit, the  
6 Nevada Supreme Court reasonably determined that Arthur's appellate counsel was not deficient  
7 for not including it in his direct appeal. Smith, 528 U.S. at 285. Arthur is denied federal habeas  
8 relief for Ground 11.2.

### 9           **3. Shifting of Burden**

10 Arthur argues that his appellate counsel failed to raise a claim on direct appeal regarding  
11 the State improperly shifting the burden of proof during closing arguments. Arthur explains that  
12 by failing to raise this claim on direct appeal, he was forced to raise it as an ineffective-assistance-  
13 of-counsel claim in his post-conviction petition, requiring that he meet a more difficult test. In  
14 affirming the denial of Arthur's state post-conviction petition, the Nevada Supreme Court held:

15 Arthur argues that appellate counsel was ineffective for failing to challenge the  
16 State's rebuttal argument as shifting the burden of proof. Arthur has failed to  
17 demonstrate deficiency and prejudice. Arthur does not explain how the challenged  
18 comments—which outlined what the State felt that the jury would have to believe  
19 and to find self-defense—shifted the burden of proof. He has thus failed to  
20 demonstrate that counsel was objectively unreasonable in not raising this claim.  
21 Further, because the comments did not shift the burden of proof, he has failed to  
22 demonstrate a reasonable probability of a different outcome on appeal had counsel  
23 raised the issue. We therefore conclude that the district court did not err in denying  
this claim.

24 The Nevada Supreme Court's rejection of Arthur's claim was neither contrary to nor an  
25 unreasonable application of clearly established law as determined by the United States Supreme  
26 Court.

1 Arthur takes issue with the follow statements made by the State during its closing  
2 argument:

3 You would have to believe that in the defendant's own mind each and every one of  
4 those blows was absolutely necessary to stop the threat of Sam Andrade.

5 You would have to believe that the force used behind every [sic] each and every  
6 one of those blows was based out of the imminent fear of death that you would have  
7 to believe was going on [sic] his mind, that it wasn't based out of revenge or anger.

8 Because under the law, ladies and gentlemen, if that's why he killed Sam he doesn't  
9 get self-defense and he can't get to not guilty. You would have to believe that his  
10 actions are the actions of a reasonable person in that situation.

9 That's the standard that you get to compare, a reasonable person, would a  
10 reasonable person in that situation have buried a knife into Sam Andrade's head 11  
times, and slit Sam Andrade's throat three times, stabbing him in the front and  
stabbed him in the back.

11 Because if those aren't the actions of a reasonable person, he doesn't get self-  
12 defense.

13 You would have to believe all of that, ladies and gentlemen; not just some of it, but  
14 all of it for this to be a case of self-defense and for him to be not guilty. That's the  
15 question that you have to answer. Is that what really happened. That's one question.

16 It is true, as Arthur contends, that the State is prohibited from using burden-shifting that  
17 relieves it of its burden of proving every element beyond a reasonable doubt. See Sandstrom v.  
18 Montana, 442 U.S. 510, 520-24 (1979). And in Nevada, “[i]f evidence of self-defense is present,  
19 the State must prove beyond a reasonable doubt that the defendant did not act in self-defense.”  
20 Runion v. State, 13 P.3d 52, 59 (Nev. 2000). However, it cannot be determined that the foregoing  
21 comments made by the State can be interpreted as stating that Arthur must prove that he acted in  
22 self-defense—rather than the State proving that he did not act in self-defense—thereby amounting  
23 to burden-shifting. As the Nevada Supreme Court reasonably noted, the State was simply outlining  
what it believed the jury would have to find to decide that Arthur was not guilty. Further, the jury

1 was properly instructed that “[i]f evidence of self-defense is present, the State must prove beyond  
 2 a reasonable doubt that the defendant did not act in self-defense.” Therefore, because this burden-  
 3 shifting issue lacks merit, the Nevada Supreme Court reasonably determined that Arthur’s  
 4 appellate counsel was not deficient for not including it in his direct appeal. Smith, 528 U.S. at 285.  
 5 Arthur is denied federal habeas relief for Ground 11.3.

6 Relatedly, in Ground 10, Arthur argues the underlying legal issue of Ground 11.3: that his  
 7 federal constitutional rights were violated when the State improperly shifted the burden of proof.  
 8 The Nevada Supreme Court held that this claim was procedurally barred and that “Arthur has  
 9 failed to demonstrate good cause and prejudice to overcome the bar. See NRS 34.810(1)(b).”  
 10 Arthur contends the Nevada Supreme was wrong because he can demonstrate good cause and  
 11 prejudice based on the ineffective assistance of his appellate counsel. However, because the Court  
 12 has already determined that Arthur’s appellate counsel was not ineffective for failing to include  
 13 this claim in his direct appeal, Arthur cannot demonstrate good cause and prejudice and is denied  
 14 federal habeas relief for Ground 10.<sup>16</sup>

15 **IV. CONCLUSION**

16 **IT IS THEREFORE ORDERED** that the First Amended Petition for Writ of Habeas  
 17 Corpus (ECF No. 28) is **GRANTED** as to Grounds 2.2, 3, 4, and 8. Petitioner George Chester  
 18 Arthur’s judgment of conviction filed on July 3, 2008, in case number C232797, in the Eighth  
 19 Judicial District Court for the State of Nevada is vacated. Within 120 days<sup>17</sup> of the later of (1) the  
 20 conclusion of any proceedings seeking appellate or certiorari review of this Court’s judgment, if  
 21 affirmed, or (2) the expiration for seeking such appeal or review, Arthur shall be released from all

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22  
 23<sup>16</sup> Arthur requests that the Court conduct an evidentiary hearing. ECF No. 28 at 66. This Court declines to do so because it is able to decide the petition on the pleadings.

<sup>17</sup> Reasonable requests for modification of this time may be made by either party.

1 custody and/or other restraints, including parole or other supervision, unless the State files a  
2 written election in this matter of its intention to retry Arthur and thereafter commences jury  
3 selection.

4 **IT IS FURTHER ORDERED** that, to the extent necessary, a certificate of appealability  
5 is denied for Grounds 1, the remainder of 2, 5, 6, 7, 9, 10, and 11.

6 **IT IS FURTHER ORDERED** that the Clerk of the Court (1) enter judgment accordingly,  
7 (2) provide a copy of this order and the judgment to the Clerk of the Eighth Judicial District Court  
8 for the State of Nevada in connection with that court's case number C232797, and (3) close this  
9 case.

10 **Dated: April 15, 2025**



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12 **RICHARD F. BOULWARE, II**  
13 UNITED STATES DISTRICT JUDGE

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